7

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted] 45

LAURA WHEELER AND CHARLES P. HOWLAND, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES C. TIFFANY, DECEASED, PLAINTIFFS IN ERROR,

vs.

WILLIAM SOHMER, COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SURROGATES' COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

FILED JUNE 20, 1911.

(22,743)

(22,743)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 667.

LAURA WHEELER AND CHARLES P. HOWLAND, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES C. TIFFANY, DECEASED, PLAINTIFFS IN ERROR,

vs.

WILLIAM SOHMER, COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SURROGATES' COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

INDEX.

	Original.	Print
Caption	*a*	1
Remittitur from court of appeals	*b*	1
Papers on appeal to court of appeals	*d*	2
Statement under rule 41	1	2
Notice of appeal to appellate division	2	3
Order of surrogate appealed from	3	4
Notice of appeal to surrogate from order fixing tax of December 13, 1910	5	5
Opinion of surrogate on second appeal to him	7	6
Order appointing appraiser	8	6
Petition for appointment of appraiser	9	6
Affidavit of Charles P. Howland, verified January 26, 1909	11	8
Affidavit of Donald T. Warner, verified January 20, 1909	18	12
Affidavit of Charles P. Howland, verified April 2, 1909	21	13
Will of deceased	22	14
Report of appraiser	29	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 28, 1911.

	Original.	Print
Order fixing tax, entered February 7, 1910	37	23
Notice of appeal to surrogate from order fixing tax, dated April 5, 1910	38	24
Opinion of surrogate on first appeal to him	42	26
Order of reversal on first appeal to surrogate	43	27
Supplemental report of appraiser	45	28
Order fixing tax, entered December 13, 1910	47	29
Stipulation in appellate division waiving certification	48	29
Opinion of appellate division	49	30
Dissenting opinion in appellate division	55	33
Order of appellate division appealed from	59	36
Notice of appeal to court of appeals	60	36
Stipulation waiving certification	62	37
Judgment on remittitur	63	38
Certificates to record	65	39
Certified copy of decision of court of appeals	66	39
Petition for writ of error	69	41
Bond on writ of error	71	42
Assignment of errors	76	46
Writ of error	81	48
Citation	84	49
Acceptance of service of citation	86	50

a The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

[New York Surrogate's Seal.]

Know ye, That we having examined the records and files in the office of the Surrogate of the County of New York, do find there remaining, a certain record of the Papers on Remittitur in the matter of the Transfer Tax upon the estate of Charles C. Tiffany deceased, in the words and figures following to wit:

b COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 9th Day of May, in the Year of Our Lord One Thousand Nine Hundred and Eleven, Before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, presiding: R. M. Barber, Clerk.

Remittitur May 10th, 1911.

In the Matter of THE TRANSFER TAX ON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

Be it remembered, That on the 13th day of April, in the year of our Lord one thousand nine hundred and eleven, Charles P. Howland and Laura Wheeler as Executors &c. the appellants in this proceeding came here into the Court of Appeals, by Howland, Murray & Prentice, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And the State Comptroller the respondent in said proceeding, afterward appeared in said Court of Appeals by John S. Jenkins, his attorney. Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon The said Court of Appeals having heard this cause argued by Mr. Charles P. Howland, of counsel for the appellants and by Mr. Henry A. Miller, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed, with costs, on opinion of McLaughlin J. below.

c And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the Surrogates Court of New York County, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by them given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court of New York County before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court before the Surrogates thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS,
Clerk's Office:

ALBANY, *May 10th*, 1911.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein attached thereto.

[L. S.] R. M. BARBER, *Clerk.*

d In the Court of Appeals of the State of New York.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

Papers on Appeal from Order of Appellate Division Affirming Order of Surrogate Affirming a Prior Order Fixing Tax.

HOWLAND, MURRAY & PRENTICE.
Attorneys for Executors-Appellants.

35 Wall Street, Manhattan, New York City.

JOHN S. JENKINS, ESQ.,
Attorney for State Comptroller, Respondent.

165 Broadway, Manhattan, New York City.

1 In the Court of Appeals of the State of New York.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

Statement Under Rule 41.

This proceeding was commenced on the 11th day of January, 1909, by filing in the office of the Surrogates of the County of New York a petition for the appointment of an appraiser. An order was

duly entered therein on the same day appointing Headley M. Greene, Esq., appraiser. The appraiser's report was filed on the 9th day of December, 1909, and an order was entered thereon on the 7th day of February, 1910, as resettled by an order entered on April 2nd, 1910, fixing the amount of the tax. An appeal was taken from said order by the executors of the estate to the Surrogate, and the order fixing the tax was reversed in certain respects by an order entered on the 5th day of July, 1910, and the proceeding remitted to the appraiser. The appraiser filed a supplemental report thereon on the 30th day of November, 1910, and an order was entered thereon fixing the tax on the 13th day of December, 1910.

An appeal was taken from said last mentioned order to the Surrogate, and the same was affirmed by an order entered on the
2 24th day of January, 1911. The executors thereupon appealed to the Appellate Division, First Department from said order, and the same was affirmed by a divided court, by an order entered in the office of the Clerk of the Appellate Division on the 10th day of March, 1911, and in the office of the Clerk of the Surrogates' Court of New York County on the 17th day of March, 1911. From such order of affirmance the present appeal to this court is taken.

The only persons interested herein who have appeared in this proceeding are the appellants, the executors, represented by Howland, Murray & Prentice, Esqs., their attorneys, and the respondent, the Comptroller of the State of New York, who has appeared herein by John S. Jenkins, his attorney.

There has been no change of parties or attorneys to this proceeding.

Notice of Appeal to Appellate Division.

Appellate Division, Supreme Court, First Department.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

SIRS: Please take notice that Laura Wheeler and Charles P. Howland, as executors of the last will and testament of Charles C. Tiffany, deceased, (who died a resident of the State of Connecticut, leaving property within the State of New York) hereby appeal to the Appellate Division of the Supreme Court in and for the first
3 judicial department from the order made by the Hon. John P. Cohalan, one of the Surrogates of the County of New York, and entered in his office on the 24th day of January, 1911, and from each and every part of said order.

Dated New York, January 24th, 1911.

HOWLAND, MURRAY & PRENTICE,
Attorneys for Appellants, 35 Wall Street, New York City.

To John S. Jenkins, Esq., Attorney for the State Comptroller, 165 Broadway, New York City.
Daniel J. Downey, Esq., Clerk of the Surrogates' Court.

Order of Surrogate Appealed From.

At a Surrogates' Court held in and for the County of New York, at the Hall of Records in said County, on the 23 day of January, 1911.

Present: Hon. John P. Cohalan, Surrogate.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

An appeal having been taken by Laura Wheeler and Charles P. Howland, as executors of the last will and testament of Charles C. Tiffany, deceased, from the order fixing and assessing the transfer tax herein made and entered in the office of the Clerk of this court on the 13th day of December, 1910, and said appeal having duly come on to be heard, now, upon the report of Headley M. Greene, the appraiser herein, which report was duly filed in this proceeding on the 9th day of December, 1909, the affidavits and record of proceedings before the appraiser filed with said report, the order of this court dated February 7, 1910, entered upon said appraiser's report and duly filed in the office of the clerk of this court on that day fixing the tax upon the estate of the above-named decedent as resettled by an order entered herein in the office of the clerk of this court on the second day of April, 1910, and the notice of appeal by the executors of the said decedent from the said order fixing the tax, filed in the office of this court on the 5th day of April, 1910, and the order entered thereon in the office of the clerk of this court on the fifth day of July, 1910, reversing the order fixing the tax in certain respects and remitting the same to the appraiser, and the supplemental report of the appraiser filed herein on the 30th day of November, 1910, and the order fixing tax entered on said report and the notice of appeal by the executors of said decedent from the said order fixing the tax, filed in the office of the clerk of this court on the 22nd day of December, 1910, which said notice of appeal recites the various grounds on which said appeal was taken, and after hearing Charles P. Howland, Esq., of counsel for the executors in support of the appeal, and Thomas B. Casey, Esq., of counsel for the Comptroller of the State of New York in opposition thereto, it is, upon motion of John S. Jenkins, Esq., attorney for the State Comptroller,

Ordered and adjudged that the grounds of appeal specified in said notice of appeal be, and they hereby are, overruled, and that the order assessing the tax entered herein on the 13th day of December, 1910, be, and the same hereby is, affirmed in all respects.

JOHN P. COHALAN, *Surrogate.*

5 *Notice of Appeal to Surrogate from Order Fixing Tax of December* 13, 1910.

Surrogates' Court, New York County.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

SIRS: Please take notice that Laura Wheeler and Charles P. Howland, as executors of the last will and testament of Charles C. Tiffany, deceased, (who died a resident of the State of Connecticut, leaving property within the State of New York), hereby appeal to the Surrogates of the County of New York from the order and determination of Honorable Abner C. Thomas, one of the Surrogates of the said County of New York, entered herein on December 13, 1910, fixing the transfer tax upon the estate of said decedent within the State of New York, and that the grounds of such appeal are as follows:

That the tax is imposed on account of property of a non-resident decedent not situated within the state of New York within the provisions of the statutes of New York relating to taxable transfers of property, and the amendments thereto, now constituting section 220 of the Tax Law, being Chapter 62 of the Consolidated Laws of New York.

That the tax is a taking of the property of the estate of the decedent without due process of law and in violation of the 14th
6 amendment to the Constitution of the United States, and in violation of Article I, Section 6, of the Constitution of the State of New York.

That the tax impairs the obligation of a contract in violation of Article I, Section 10, of the Constitution of the United States.

The specific property of the above-named decedent so improperly taxed, is as follows:

1. Four promissory notes, deposited within the State of New York, of the value, including accrued interest of $15,147.91, made by one George E. Pottinger, a resident of the State of Illinois, and secured by and a lien upon certain real property situated in the State of Illinois.

2. The joint life interest of Laura Burr Tiffany and Grace Tiffany Maisch in the promissory notes of the Southern Railway Company, a corporation organized under the laws of the State of Virginia, deposited within the State of New York, which were appropriated by the trustee to the trust created by the fifth clause of the will of the decedent, said joint life interest being of the value of $6,389.00.

3. Two promissory notes deposited within the State of New York, of the value, including accrued interest, of $20,316.67, made by one Edwin B. Sheldon, a resident of the State of New York, and secured by a lien upon certain real property situated in the State of Illinois.

That the tax on $8,591.67 part of the proceeds of promissory notes of the New York Central & Hudson River Railroad Company, deposited within the State of New York, which was appropriated by the executors in part satisfaction of the legacy bequeathed to Charles

P. Howland under the twenty-first clause of the will of the decedent in lieu of his commissions as executor and trustee, is illegal and void. Such legacy being in lieu of executor's and trustee's commissions and not being in excess of the amount prescribed by
7 law for such commissions, is exempt from the payment of any transfer or inheritance tax.

Dated New York, December 21st, 1910.

Yours, etc.,

HOWLAND, MURRAY & PRENTICE,

Attorneys for the Executors, 35 *Wall Street, New York City.*

To Daniel J. Dowdney, Esq., Clerk of the Surrogates' Court, New York County.

John S. Jenkins, Esq., Attorney for State Comptroller, 165 Broadway, New York City.

Opinion of Surrogate on Second Appeal.

Estate of Charles C. Tiffany.—The points raised by this appeal have already been decided by me (Matter of Tiffany, Surr. Decs. 1910, p. 429). Order fixing tax affirmed.

8 *Order Appointing Appraiser.*

At a Surrogates' Court held in and for the County of New York at the Hall of Records in the said County on the 11th day of January, 1909.

Present: Hon. John P. Cohalan, Surrogate.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

Upon reading and filing the petition of Charles P. Howland, one of the executors of the will of the above named decedent, I do hereby, pursuant to the requirement of the statute, direct Headley M. Greene, Esq., one of the appraisers appointed by the State Comptroller under the statute, to fix the fair market value of the property which was of the above named decedent and which is subject to the payment of any tax imposed by Article X., Chapter 908, Laws of 1896 and the acts amendatory thereof and supplemental thereto.

JOHN P. COHALAN, *Surrogate.*

9 *Petition for Appointment of Appraiser.*

Surrogates' Court, County of New York.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

To the Surrogates' Court of the County of New York:

The petition of Charles P. Howland respectfully shows:

1. That your petitioner is one of the executors named by and

acting under the will of the said Charles C. Tiffany, deceased, and as such is a person interested in the estate of the said decedent.

2. That the said decedent departed this life on the 20th day of August, 1907, at North East Harbor, Maine; that the said decedent was a resident of the village of Sharon in the State of Connecticut at the time of his death.

3. That the will of the said decedent was duly admitted to probate by the probate court for the district of Sharon in the State of Connecticut on the 21st day of September, 1907, and that letters testamentary on the estate of the said deceased were on the 21st day of September, 1907, issued by the said probate court to Laura Wheeler and your petitioner Charles P. Howland, the executors named in said will; that the post office address of your petitioner is No. 35 Wall Street, New York City; that the post office address of the said Laura Wheeler is Sharon, Connecticut.

4. That upon application made by the said Laura Wheeler to the Surrogates' Court of the County of New York on the 14th day of October, 1907, accompanied by a copy of the will and of the letters testamentary issued by the probate court of the District of Sharon, Connecticut, above referred to, authenticated as prescribed in Section 2704 of the Code of Civil Procedure, the said will and the said letters testamentary were duly recorded in said Surrogates' Court and thereupon ancillary letters testamentary were, on the 17th day of October, 1907, issued out of said court to the said Laura Wheeler and to your petitioner.

5. That, as your petitioner is informed and believes, the said decedent, who was at the time of his death a non-resident of the State of New York, was possessed at that time of certain property within the State of New York, which said property, or some part thereof, or some interest therein, is or may be subject to the statutes of New York in relation to taxable transfers of property and to a payment of some tax imposed thereby.

6. That the only persons who are interested in the property of the said decedent within the State of New York and are entitled to notice of all proceedings herein, and their post office addresses, are as follows:

Name.	Address.
The Comptroller of the State of New York.	
Laura Wheeler (sister-in-law)	Sharon, Connecticut.
Charles P. Howland (no relation) ...	35 Wall Street, New York City.

All of the above named persons are of full age and of sound mind.

Wherefore your petitioner prays that you will designate an appraiser as provided by law.

Dated, New York, December 16th, 1908.

CHARLES P. HOWLAND, *Petitioner.*

HOWLAND, MURRAY & PRENTICE,
Attorneys for Petitioner, 35 Wall Street,
New York City.

11 STATE OF NEW YORK,
County of New York, ss:

Charles P. Howland, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CHARLES P. HOWLAND.

Sworn to before me this 16th day of December, 1908.
[SEAL.] HERBERT S. BARNES,
Notary Public, New York County.

Affidavit of Charles P. Howland, Verified January 26th, 1909, Read in Behalf of Appellant.

Surrogates' Court, County of New York.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

STATE OF NEW YORK,
County of New York, ss:

Charles P. Howland, being duly sworn:

I am one of the executors of Charles C. Tiffany, deceased.

12 My post office address is No. 35 Wall Street, New York.

The said decedent died on August 20th, 1907, at North East Harbor, Maine, and at the time of his death was a resident of Sharon, Connecticut. His will was duly admitted to probate by the probate court for the District of Sharon in the State of Connecticut on the 21st day of September, 1907, and letters testamentary were issued by said court to Laura Wheeler and this deponent, the executors named in said will, on the 21st day of September, 1907. A copy of the will of said decedent is hereto annexed marked "Exhibit 'A'" and made a part of this affidavit * * * (the omitted portion relates to property concerning the taxability of which no question arises).

In the safe deposit box of the decedent at the Fifth Avenue Trust Company in the City of New York, opened after his death in the presence of a representative of the State Comptroller, were found the following:

$15,000 par value of the 3-year 5% promissory notes of the New York Central & Hudson River Railroad Company, a corporation organized under the laws of the State of New York, due February 1, 1910, with coupons for interest payments subsequent to August 1, 1907, attached, being No. X134 for $10,000, and Nos. 15133 to 15137 inclusive for $1000 each. Value on August 20, 1907, at 97 and interest..... $14,591.67

$10,000 par value of the 3-year 5% gold promissory notes of the Southern Railway Company, a corporation organized under the laws of the State of Virginia, due February 1, 1910, with interest coupons subsequent to August 1, 1907, attached, being Nos. 8893 to 8900 inclusive, and A10740 to 10741 inclusive. Value on August 20, 1907, at 91 ..... 9,127.22

Two 5-year notes of $10,000 each, dated June 2, 1902, and on June 2, 1907, renewed for five years each, bearing 5% interest, made by Edwin B. Sheldon to his own order and endorsed by himself in blank. These promissory notes are amply secured by trust deed of real property in Chicago, Illinois, made by said Sheldon to Eugene H. Fishborn, a resident of Chicago, as trustee, and are a lien upon said real property. Mr. Sheldon is a resident of Delhi, New York. Value on August 20, principal and accrued interest 20,316.67

Three promissory notes of $3,000 each, due August 15, 1908, bearing 5% interest, made by George E. Pottinger to his own order and endorsed by himself in blank. These promissory notes were amply secured by trust deed of real property in Chicago, Illinois, made by said Pottinger to Chicago Title & Trust Company, an Illinois corporation, as trustee, and are a lien upon said real property; Mr. Pottinger is a resident of Chicago, Illinois. Value on August 20, 1907, principal and accrued interest 9,006.25

One promissory note of $6000 due March 1, 1909, bearing 5% interest, made by George E. Pottinger to his own order and endorsed by himself in blank. This note is amply secured by trust deed of real property in Chicago, Illinois, to said Eugene A. Fishborn as trustee, and is a lien upon said real property. Value on August 20, 1907, principal and accrued interest 6,141.67

$59,083.48

* * * The executors have applied and paid to the New York Training School for Deaconesses the entire proceeds of two of the bonds of the Pawtuxet Valley Electric Street Railroad Company above enumerated, valued at $1,000 each, the entire proceeds of the preferred shares of the American Locomotive Company valued at $9,900, and $6,000 out of the proceeds of the $15,000 par value of the three-year notes of the New York Central Railroad above enumerated in further part satisfaction of the legacy given to it by the eighteenth clause of said will. * * *

The executors have set apart and elected to apply in part satisfaction of the legacy to the executor and trustee in lieu of commissions under the twenty-first clause of the will, the remainder of the

proceeds of the $15,000 par value of New York Central notes remaining after the payment of $6,000.00 thereof to the New York Training School for Deaconesses; and said remaining proceeds so set apart will eventually be paid to said executor and trustee in part satisfaction of his legacy in lieu of commissions. Said executor and trustee is a resident of the state of New York. The assets everywhere located of the estate of said decedent at the time of his death had in the aggregate market value of approximately $420,000, the valuation of the appraisers appointed by the probate court of the state of Connecticut being accepted for the entire personalty and the realty in Connecticut amounting to $322,693.22, and the valuation of certain real property in Illinois, belonging to the decedent, amounting to $78,828.58, being taken from the appraisal and report of commissioners, dated September, 1906, appointed by the circuit court of Cook County in the state of Illinois in an action in partition in which said real property was allotted and conveyed to the decedent by the referee in said action. The services imposed upon the executor by the will require the selling by him as the active executor of unimproved real property valued at approximately $100,000, of which there is located in the outskirts of Chicago, Illinois, where sales of land have been stagnant for a number of years, land valued at $78,828.58. In addition to the services imposed upon him by the will, extensive services were required of and rendered by him in opposing the contest of the will. Said executor, who
15 is a lawyer, spent three months in preparation for the jury trial of this contest, examining the correspondence of his firm with the decedent for twenty years past, voluminous records in former litigations in which the decedent was interested, many wills, the decedent's diaries since 1858, and a great mass of other documentary matter, interviewing about a hundred witnesses; taking depositions in New York and Baltimore; conferring at great length with counsel and preparing elaborate trial briefs and memoranda of law; attending the trial at Winsted, Litchfield County, Connecticut, daily from May 19th to June 16th, 1908; taking part in the preparation for each day's proceedings, and making preparation for the appeal before it was abandoned by the contestants. For all these services, not contemplated by the testator at the time of the execution of the will, the executor and trustee has received and will receive no compensation in addition to said legacy of $10,000, that amount being accepted by him in full payment for all his services as such executor and trustee. This deponent is informed that the amount of said legacy of $10,000 is a reasonable and just sum to be allowed to said executor and trustee for the services required of and performed by him, and that it is substantially less than the sum customarily allowed to an executor and trustee for such services by the probate courts of the state of Connecticut under the laws of said state, as appears by an affidavit of Hon. Donald T. Warner, verified January 20, 1909, which is hereto annexed.

The trustee appointed by the fifth clause of said will has selected under its terms for the trust fund created thereby, the following securities from among those above enumerated herein:

The 10 Chesapeake & Ohio R. R. bonds;
The 10 Consolidated Gas Company of Kansas City bonds;
The 5 Lehigh & Hudson River R. R. bonds;
Five of the Pawtuxet Valley Electric Street R. R. bonds;
16 The 10 Southern Railway 50% gold notes of $1,000 each.

Of the life beneficiaries in said trust fund one was forty years of age and the other was over fifty years of age at the time of the decedent's death. The remainder interest in this trust fund passes by the terms of the will to the New York Training School for Deaconesses. Said beneficiaries and said trustee are all residents of the state of New York.

The trustee appointed by the sixth clause of said will has selected under its terms for the trust fund created thereby the two promissory notes of Edwin B. Sheldon of the par value of $10,000 each, above referred to; one of the $3,000 promissory notes of George E. Pottinger, above referred to; and $2,000 of the amount secured upon another of said $3,000 notes of George E. Pottinger, above referred to. John McClintock Tiffany, the beneficiary in said trust fund, was over fifty years of age at the time of the decedent's death; said John McClintock Tiffany died September 10, 1907, and the fund has been transferred by the trustee to the remaindermen, the Ogden Memorial Library, subject to the deduction for expense of the contest of the will. Said John McClintock Tiffany was a resident of the state of New York during the year 1907; said Ogden Memorial Library is a corporation organized and existing under the laws of the state of New York, and said trustee is a resident of the state of New York. * * *

The following items of indebtedness to persons resident in the state of New York and corporations incorporated under its laws were incurred by the decedent during his lifetime and were due and owing at the time of his death, and the following expenses of administration have been expended or will be expended entirely within this state:

17 Dr. Theodore Dunham—medical services.	$150.00
Dr. T. Stuart Hart—medical services....	5.00
Manhattan Storage Company.....	18.00
J. E. Leaycraft & Co.—rent of apartment under lease	1,335.00
Howland, Murray & Prentice, attorneys—legal services and expenses for over five years in matters connected with the Ogden Estate and other matters	7,846.86
Legal fees, disbursements and general expenses of administration, confining such expenses entirely to the ancillary administration within this estate (estimated).....	5,000.00
Total.....	$14,354.86 ****

CHARLES P. HOWLAND.

Sworn to before me this 26th day of January, 1909.

B. JERMAIN SAVAGE,
Notary Public, New York County.

18 *Affidavit of Donald T. Warner. Verified January 20th, 1909.*

Surrogates' Court, County of New York.

In the Matter of the Transfer Tax Upon the Estate of CHARLES C. TIFFANY, Deceased.

STATE OF CONNECTICUT,
County of Litchfield, ss:

Donald T. Warner, being duly sworn, deposes and says:

I am fifty-eight years of age and reside in the Town of Salisbury, in the County of Litchfield, State of Connecticut. I have been a member of the bar of said state since 1873. For the years 1885 to 1909 inclusive I was the judge of probate of the District of Salisbury, in the County of Litchfield, in said state, and since 1896 have been and still am the State's Attorney for the County of Litchfield.

At the request of the executors of the estate of Charles C. Tiffany I have carefully examined his will and have also examined the inventory of his personalty, and of his realty within the State of Connecticut, filed in the office of the Probate Court of the District of Sharon in said State. Said inventory shows the property therein enumerated to be valued at Three hundred and twenty-two thousand six hundred and ninety-three and 22/100 dollars. I am informed by said executors that the gross assets of the decedent at the time of his death were worth approximately the amount of $420,000.

19 of which about $100,000 consisted of unimproved real property in the States of New York, New Jersey and Illinois, including the outskirts of Chicago, Illinois, where sales of land have been stagnant for a number of years, land valued at $80,000.

I have read that portion of the affidavit of Charles P. Howland, the executor of the will of the decedent, setting forth the services performed by him in opposing the contest of the will of the said decedent.

Under the law of the State of Connecticut, executors and trustees do not receive commissions or fees measured by percentages of the value of the property coming into their hands or administered by them; the compensation of such executors and trustees under the law of the State of Connecticut is made in the form of an allowance by the Probate Court probating the will of a sum or sums of money to the executors and trustees. The court in determining such allowance takes into consideration the gross value of the estate, the nature of the property of which it is composed, whether readily marketable, as in the case of securities sold upon exchanges, or whether slow and difficult of sale, as in the case of unimproved real property, and the nature and extent of the services rendered or to be rendered by the executors and trustees.

For many years as judge of probate I made allowances to executors and trustees in the administration of estates on the principles above set forth, and ever since my admission to the bar I have practiced in the probate courts in the various districts of Connecticut and am familiar with the allowances made by such courts to executors and trustees in a very large number of cases. I do not now recall any instance in my own court of an estate of the magnitude of this one, requiring services as arduous and as extensive as those performed by the said executor, Charles P. Howland, but I know that proportionately I have allowed larger sums for compensation than the amount of $10,000 for such services as are required of the said executor and trustee, Charles P. Howland, by the will of the decedent in addition to these required of and performed by him as set forth in his affidavit and referred to herein, and in my opinion said compensation of $10,000 is less than the amount customarily allowed by the various courts of probate in the State of Connecticut under similar cases, and in my judgment it would be proper and reasonable for the Probate Court to allow, in compensation of such services rendered under such circumstances, a sum of not less than fifteen thousand dollars and it is my opinion that if application were made therefor in the present instance in lieu of the acceptance of his legacy by the executor and trustee, an allowance of not less than fifteen thousand dollars would be made to him by the Probate Court for his services, and that amount is a just and reasonable compensation to him in the premises.

DONALD T. WARNER.

Sworn to before me this 20th day of January, 1909.

HOWARD F. LANDON,
Notary Public.

Affidavit of Charles P. Howland, Verified April 2nd, 1909, Read on Behalf of Appellant.

Surrogate's Court, New York County.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

STATE OF NEW YORK,
County of New York, ss:

Charles P. Howland, being duly sworn, deposes and says: I am one of the executors of Charles C. Tiffany, deceased, and have heretofore made two affidavits in this proceeding, verified respectively on January 26th and January 28th, 1909.

The law of Connecticut requires an inheritance tax to be paid to that state upon all the real property of the decedent situated in the State of Connecticut and upon all the personal property of whatever character owned by him at the time of his death, wherever situated, including all the personal property having its physical situs in New

York and the stock in New York corporations. This tax, under the Connecticut law, is at the rate of three per cent. There is, therefore, already—double taxation upon all the personal property taxable under the transfer tax law of the State of New York.

CHARLES P. HOWLAND.

Sworn to before me this 2nd day of April, 1909.

LUCIUS A. WILSON,
Notary Public, County of New York.

22 *Will of Deceased.*

I, Charles Comfort Tiffany, Clergyman of the Protestant Episcopal Church and a resident of Sharon, Connecticut, do make, publish and declare this my last Will and Testament, hereby revoking all wills heretofore made.

First. It is my wish that my body be buried beside that of my wife in Woodlawn Cemetery, New York City; and I direct that all my funeral expenses be paid at once. I further direct that all my just debts and testamentary expenses be paid as soon as practicable.

Second. I give and bequeath to my sister-in-law Emily Ogden Wheeler one hundred and fifty shares of the stock of the Chicago Dock and Canal Company, and to my sister-in-law Laura Wheeler seventy-five shares of the said stock.

Third. I give, devise and bequeath to my sister-in-law Laura Wheeler, her heirs and assigns forever, the real estate in Sharon, Litchfield County, Connecticut, known by the name of Home Lot Cottage, together with all the buildings erected on said premises and the personal chattels in said cottage and upon said premises, except such special bequest of books, pictures or furniture as may be otherwise directed.

Fourth. I give and bequeath to my sister-in-law Caroline Wheeler Schwab, wife of Gustav H. Schwab of New York City, Fifteen Thousand Dollars ($15,000), and to my niece E. Emily Ogden Schwab, daughter of Gustav H. Schwab and Caroline Wheeler Schwab of New York City, Twenty Thousand Dollars ($20,000).

Fifth. I give and bequeath to Charles P. Howland of the City of New York, the sum of Seventy-five thousand dollars ($75,000) in securities of the par value of that amount, to be selected by him from among such securities as may be in my possession at the time of my death: In trust, however, to collect and receive the net income thereof, and to pay over the same at least as often as semi-
23 annually to my two nieces, Laura Burr Tiffany and Grace C. Tiffany, for and during the terms of their natural lives, share and share alike; and in case of the death of either to pay the whole of the net income to the survivor during her natural life.

I give to my said trustee power in his discretion to retain the securities in their present form of investment, or to sell the same and re-invest, without being limited whether as to retention or reinvestment in any way by the laws of the State of Connecticut or of any other state, applicable to investments by trustees.

Upon the death of the survivor of my said two nieces, I direct that the trustee at the time being of the fund then constituting the principal of said trust transfer and set over the same to the Trustees of the New York Training School for Deaconesses of the Protestant Episcopal Church in the Diocese of New York, to be held and administered by them as an endowment of said Training School under the title of the "Charles and Julia Tiffany Endowment Fund."

Sixth. I give and bequeath to the said Charles P. Howland the sum of Twenty-five Thousand Dollars ($25,000) in securities of the par value of that amount, to be selected by him from among such securities as may be in my possession at the time of my death: In trust, however, to collect and receive the net income therefrom, and to pay over the same at least as often as semi-annually to my nephew John McClintock Tiffany, during the term of his natural life. I give to my said trustee power in his own discretion to retain the securities in their present form of investment, or to sell the same and re-invest, without being limited whether as to retention or re-investment in any way by the laws of the State of Connecticut or of any other state, applicable to investments by trustees.

Upon the death of my said nephew I direct that the trustee at the time being of the fund then constituting the principal of said trust transfer and set over the same to the Trustees of the Ogden Memorial Library in the Town of Walton, Delaware County, New York, to be held by them as a trust fund under the title of the
24 "Julia Wheeler Tiffany Endowment Fund," the income of said fund to be solely applied to the purchase, repair and binding of books and pamphlets for the said Library.

Seventh. I give and bequeath to my nieces Laura Burr Tiffany and Grace C. Tiffany, and my nephew John McClintock Tiffany Fifteen hundred dollars ($1500) each.

The legacies given in this clause are to be paid immediately.

Eighth. I give and bequeath to my nephew Charles Otis Tiffany One thousand dollars ($1000).

I give and bequeath to my nephew Joseph Burr Tiffany, Five hundred dollars ($500) and further direct my executors to cancel and destroy any and all evidences of his indebtedness to me which may be found among my papers, in forgiveness of any such indebtedness.

Ninth. I give and bequeath to Mrs. Julia Gilman Tiffany, widow of my late nephew Walton Cuyler Tiffany, Five thousand dollars ($5,000). Should she die before me, I give and bequeath the said sum among her children as follows:

Five hundred dollars ($500) to Gilman Parris Tiffany;

Twenty-five hundred dollars ($2500) to Doris Tiffany;

Two thousand dollars ($2000) to Humphrey Cuyler Tiffany; the bequest to any child who may die before me to be divided equally between those surviving me.

Tenth. I give and bequeath to my cousin Edward Tiffany of Boston, Massachusetts, long connected with the Boston Public Library, One thousand dollars ($1000).

I give and bequeath to my cousin Reverend Francis Tiffany of Cambridge, Massachusetts, the sum of One thousand dollars ($1000).

I give and bequeath to my four cousins, namely: Alice Thorndyke Tiffany of Baltimore, Maryland; Beatrice Bradley-Jones of Baltimore, Maryland; Mary Brown Tiffany of Cambridge, Massachusetts; and Esther Tiffany of Cambridge, Massachusetts, the sum of Five hundred dollars ($500) each.

Eleventh. I give and bequeath to Mrs. Antoinette Cannon, of Deposit, New York, wife of Robert Cannon and daughter of George D. Wheeler, of said Town of Deposit, New York, Five thousand dollars ($5,000). In case she should die before me, leaving children surviving me, I give and bequeath the said sum share and share alike to such children as shall survive me.

Twelfth. I give and bequeath to my faithful gardener Thomas Flanagan of Sharon, Connecticut, the sum of Two thousand dollars ($2,000).

I give and bequeath to Margaret Sullivan of Sharon, Connecticut, who has been in my service from time to time, the sum of Five hundred dollars ($500).

I give and bequeath to my man-servant Charles Saunders, if he be in my service at the time of my death, One thousand dollars ($1,000).

Thirteenth. I give and bequeath to the Archdeaconry of New York of the Protestant Episcopal Church in the Diocese of New York the sum of Fifteen thousand dollars ($15,000) to be devoted to the use of St. David's Church for colored people in the Borough of the Bronx, New York City, and Five hundred dollars ($500) of this sum to be paid over by the said Archdeaconry as a personal legacy to Reverend E. G. Clifton, at present rector of said church, if he be living and rector of said church at the time of my death, otherwise to be devoted to the use of said church.

Fourteenth. I give and bequeath to the Town of Sharon, Connecticut, the sum of One thousand dollars ($1,000) to be invested by the Selectmen of said Town for the benefit of the Town House for the Poor of the Town of Sharon, Connecticut, the income thereof to be used for the comfortable maintenance of such poor as may from time to time be inmates of said Town House.

Fifteenth. I give and bequeath to the Trustees of the Hotchkiss Library in the Town of Sharon, Connecticut, the sum of One thousand dollars ($1,000) to be used by them solely for the increase of the books of said Library in such sums and at such times as they see fit.

Sixteenth. I give and bequeath to the Wardens and Vestry-men of Christ Church (Protestant Episcopal) of Sharon, Connecticut, the sum of Two thousand dollars ($2,000) to be invested as an endowment fund, the income to be applied to the maintenance of the worship of the church. In case of the destruction of or injury to the present or any substituted church building, or the rectory by fire, the principal of the said endowment fund or any part thereof may, at the discretion of the Wardens and Vestrymen, be used for necessary rebuilding or repairs.

Seventeenth. All the foregoing bequests are to take precedence of those hereinafter contained, both as to time and as to fullness of payment.

Eighteenth. I give and bequeath the sum of One hundred and twenty-five thousand dollars ($125,000) to the Trustees of The New York Training School for Deaconesses of the Protestant Episcopal Church in the Diocese of New York, to be applied by them under the direction of the Reverend William R. Huntington, D. D. (now rector of Grace Church, New York, and Warden of the Training School for Deaconesses), to the following purposes:

(1) The erection of a suitable building for the occupancy of said Training School for Deaconesses in the grounds of the Cathedral of St. John the Divine in the City of New York.

(2) The suitable furnishing of said building.

The building is to be called the "Memorial of Julia Wheeler Tiffany—Constituted by her husband, the third Archdeacon of New York."

Should the Reverend William R. Huntington die before me, then the application of said moneys is to be under the direction of the Trustees of the said Training School.

In case I should make any payments during my lifetime to The New York Training School for Deaconesses of the Protestant Episcopal Church in the Diocese of New York, or to any person
27 acting in its behalf or either of the purposes hereinbefore described, then the amount of any payment or payments so made is to be deducted from the foregoing bequest of One hundred and twenty-five thousand dollars ($125,000).

Nineteenth. I give and bequeath to the Trustees of the St. Paul's school for the Training of Colored People, in Lawrenceville, Virginia, at present under the direction of Reverend J. S. Russell, the sum of Twenty-five thousand dollars ($25,000) for such use of the school as may be deemed most suitable by them.

Twentieth. All my personal effects, including books, pictures, wardrobe, jewelry, household articles, silver, furniture, horses and carriages, and other chattels not specifically disposed of, I give and bequeath, share and share alike, to my sister-in-law Laura Wheeler and my nieces Laura Burr Tiffany, Grace C. Tiffany and E. Emily Schwab, in the expectation that they will make such use and ultimate disposition of them as would meet with my approval.

Twenty-first. I give and bequeath to my executor and trustee Charles P. Howland, the sum of Ten thousand dollars ($10,000) in lieu of charges and commissions to which he may be entitled as executor of this will and as trustee of the trusts created thereby.

The legacy and devise to my sister-in-law Laura Wheeler contained in articles second and third of this will are likewise in lieu of all her charges and commissions as executrix thereof.

Twenty-second. All the rest, residue and remainder of my property, both real and personal, of whatsoever nature and wheresoever situated, I give, devise and bequeath to my executors, their heirs and assigns forever, absolutely, requesting but not directing them to make such disposition thereof as may accord with my wishes ex-

pressed to them in a letter which I leave on this subject addressed to them.

Twenty-third. I direct that all legacy, inheritance and succession taxes upon any transfer made by this will or upon any of the property, passing thereunder, whether present or future, be paid
28 by my executors out of my residuary estate, so that no devise or bequest shall be diminished by any such taxes.

Twenty-fourth. I nominate, constitute and appoint as executors of this will my sister-in-law Laura Wheeler of Sharon, Connecticut, and Charles P. Howland of the City of New York, and I direct that no bonds or other security be required from either of them, wherever they may qualify.

I give to my said executors power in their discretion, to sell or mortgage all or any part of my real property, not specifically devised, upon such terms and at such prices or for such amounts as they think best; and in case of mortgages, power to apply the proceeds thereof at their discretion in repair or improvements of the mortgaged premises.

In witness whereof, I have hereunto subscribed my name and affixed my seal, this sixth day of February, in the year of our Lord, one thousand nine hundred and seven.

CHARLES COMFORT TIFFANY. [L. S.]

Subscribed, sealed, published and declared by the said Charles Comfort Tiffany, the testator, as and to be his last Will and Testament, in the presence of us and of each of us, and we, at his request, and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses to the execution thereof.

E. PARMALEE PRENTICE,
5 *West 53rd Street, New York, N. Y.*
ROBERT McC. MARSH,
45 *East 20th Street, New York City.*
HOWARD E. BROWN,
108 *West 44th Street, New York City.*

29 *Report of Appraiser.*

Surrogates' Court, County of New York.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

To the Surrogates' Court of the County of New York:

I, Headley M. Greene, who was by an order of Hon. John P. Cohalan, one of the Surrogates of the County of New York, made and entered on the 11th day of January, 1909, certified copy of which order is hereto annexed, directed to act as appraiser pursuant to Chapter 908 of the Laws of 1906 and the acts amendatory thereof and supplemental thereto, do respectfully report:

First. Having filed my oath of office pursuant to Chapter 173 of the laws of 1901 in the office of Hon. Charles H. Gaus, State Comptroller, I gave notice by mail, postage prepaid, to all persons known to have or claiming to have an interest in the transfer tax upon the property of said deceased, to wit, to the following persons and corporations named in the petition presented on the application for said order. The time and place were duly set forth in said notice at which I would appraise such property of the above named decedent as might be subject to the payment of the transfer tax; a true copy of said notice is hereto attached:

Names:

John S. Jenkins.
Howland, Murray & Prentice.
Charles P. Howland.
Laura Wheeler.

30 Second. I further report that on April 19, 1909, at three o'clock in the afternoon (an adjournment having been taken by consent of all concerned to such day and hour from the day and hour named in the said notice) at Room No. 800, No. 128 Broadway, Borough of Manhattan, City of New York, I appraised the estate of Charles C. Tiffany, deceased, subject to tax herein at its fair market value on the 20th day of August, 1907, the date of his death, as follows:

Personal Estate.

Ten 5% bonds of the Consolidated Gas Co. of Kansas City, due April 1, 1922, of par value $10,000 at 97 . .	$9,700.00
Ten 4½% bonds of the Chesapeake & Ohio Railroad Co. due March 1, 1992, of par value $10,000 at 100, including the coupons due September 1, 1907.	10,000.00
Five 5% bonds of the Lehigh & Hudson River Railroad Co. due July 1, 1920, of par value $5,000 at 100⅛	5,056.25
Seven first mortgage 5% bonds of the Pawtuxet Valley Electric Street R. R. Co. bonds, due January 1, 1933, of par value $7,000 at 100.	7,000.00
100 shares of the preferred stock of the American Locomotive Co. of par value $10,000 at $99 per share . . .	9,900.00
100 shares of the Western Union Telegraph Co. of par value $10,000 at $75.50.	7,550.00
$15,000 par value of the 3 year 5% promissory notes of the New York Central & Hudson River Railroad Company, a corporation organized under the laws of the State of New York, due Feb. 1, 1910, with coupons for interest payments subsequent to	
31 Aug. 1, 1907, attached, being No. X134 for $10,000 and Nos. 15,133 to 15,137 inclusive for $1,000 each. Value on Aug. 20, 1907, at 97 and interest.	$14,591.67

Cash on deposit in the Fifth Avenue Trust Company on the date of the decedent's death, with interest allowed thereon as of that date..... 19,529.03

Mortgages upon unimproved real property in the Borough of the Bronx, in the City of New York, amounting in principal to $54,084.00, and with interest calculated to August 20, 1907, to..... 54,562.88

An interest amounting to 61/1200 (or 5 1/1200%) in the cash proceeds amounting to $180,982.92 of certain lands in the Borough of the Bronx, in the City of New York, theretofore sold in an action of partition brought in the Supreme Court of the State of New York in which the decedent was one of the parties defendant, which cash proceeds on August 20, 1907, were in the hands of Wilbur Larremore, Esq., as Referee, the share of the decedent being..... 10,725.00

An interest amounting to 61/1200 (or 5 1/1200%) in the distributable balance of the assets belonging to the estate of William B. Ogden, deceased, of which estate Edwin B. Sheldon was and is the administrator with the will annexed and the substituted trustee, which assets are estimated at not to exceed at the most the sum of $27,000.00, the share of the decedent therein not exceeding..... 1,372.50

Chattels consisting of second-hand personal and household effects in an unoccupied apartment at No. 252 Madison Avenue and at the Diocesan House of the Diocese of New York..... 647.50

Lincoln National Bank..... 20.00

32 $10,000 par value of the 3 year 5% gold promissory notes of the Southern Railway Company, a corporation organized under the laws of the State of Virginia, due February 1, 1910, with interest coupons subsequent to August 1, 1907, attached, being Nos. 8893 to 8900 inclusive, and A10740 to 10741 inclusive. Value on August 20, 1907, at 91.. $9,127.22

Two 5 year notes of $10,000 each, dated June 2, 1902, and on June 2, 1907, renewed for five years each, bearing 5% interest, made by Edward B. Sheldon to his own order and endorsed by himself in blank. These promissory notes are amply secured by trust deed of real property in Chicago, Illinois, made by said Sheldon to Eugene H. Fishborn, a resident of Chicago, as trustee, and are a lien upon said real property. Mr. Sheldon is a resident of Delhi, New York. Value on August 20, 1907, principal and accrued interest..... 20,316.67

Three promissory notes of $3,000 each, due August 15, 1908, bearing 5% interest, made by George E. Pottinger to his own order and endorsed by himself in blank. These promissory notes were amply secured

by trust deed of real property in Chicago, Illinois, made by said Pottinger to Chicago Title & Trust Company, an Illinois corporation, as trustee, and are a lien upon said real property; Mr. Pottinger is a resident of Chicago, Illinois. Value on August 20, 1907, principal and accrued interest..... $9,006.25

One promissory note of $6,000 due March 1, 1909, bearing 5% interest, made by George E. Pottinger to his own order and endorsed by himself in blank. This note is amply secured by trust deed of real property in Chicago, Illinois, to said Eugene H. Fishborn as trustee, and is a lien upon said real property. Value August 20, 1907, principal and accrued interest..... $6,141.67

33

$189,146.64

Real Estate.

(Here follows a description of certain real estate in which the decedent had an undivided 61/1200 interest.)

Said undivided interest being worth..... $11,742.50
Gross estate, real and personal..... 200,889.14

I further report that the estate of this decedent is subject to the following deductions and debts due to persons resident in the State of New York and corporations incorporated under its laws:

Dr. Theodore Dunham	$150.00	
Dr. T. Stewart Hart	5.00	
Manhattan Storage Co.	18.00	
J. E. Leaycraft & Co.	1,335.00	
Howland, Murray & Prentice	7,846.86	
		$9,354.86
Expenses of ancillary administration within this State		5,000.00

New York assets marshalled by the executors to payment of the exempt legacies as follows:

Cash on deposit to St. David's Church	$13,529.03	
Pawtuxet bonds to New York Training School for Deaconesses	2,000.00	
Western Union stock to New York Training School for Deaconesses	7,550.00	
American Locomotive, preferred stock to New York Training Schools for Deaconesses	9,900.00	
New York Central notes to New York		

34

Training School for Deaconesses....	6,000.00	
Real estate mortgages to New York Training School for Deaconesses.....	54,562.88	
Interest in participation sale, proceeds to New York Training School for Deaconesses	10,725.00	
Undistributed interest in Ogden Estate to New York Training School for Deaconesses	1,372.50	
Realty to New York Training School for Deaconesses	11,742.50	
Commissions of Charles P. Howland, as executor and Laura Wheeler as executrix	4,397.78	
Remainder interest in the following:		
Chesapeake & Ohio bonds....	$10,000.00	
Kansas City Gas bonds.....	9,700.00	
Lehigh & Hudson bonds....	5,056.25	
Pawtuxet bonds.....	5,000.00	
Southern Railway notes.....	9,127.22	
	$38,883.47	
Less trustee's commissions..	579.00	
	$38,304.47	
Such remainder to New York Training School for Deaconesses.....		$11,462.00
35 Difference between the present value of Life Estate and Remainder and Principal of Trust Fund, as follows:		
(1) In Fund of.....	$29,322.92	
Less commns. of Trustee.	483.22	
	$28,839.70	$1,055.92
(2) In Fund of.....	$38,883.47	
Less commns. of Trustee.	579.00	
	$38,304.47	1,152.47
(as per certificates of the Superintendent of Insurance, hereto annexed).....		$135,450.08
Total of exemptions.....		149,804.94
Not taxable estate		$51,084.20

Third. I further report that Charles C. Tiffany died on the 20th day of August, 1907, a resident of Sharon, State of Connecticut, leaving a last will and testament, a copy of which is hereto annexed.

which was duly admitted to probate by the Probate Court for the District of Sharon, in the State of Connecticut, on the 21st day of September, 1907. Letters Testamentary were issued by said Court on the 21st day of September 1907 to Laura Wheeler, Sharon, Connecticut, Charles P. Howland, 13 West 11th St., New York City.

By the provisions of this will of the said decedent and by the election of the executors all of the property of the decedent within the State of New York not included in the foregoing deductions is given, devised and bequeathed and passes to devisees and legatees in the five per cent. class.

Fourth. I further report that all persons who are interested in the estate of this decedent are of full age and of sound mind.

36 Fifth. I further report the following appearances before me in this proceeding: John S. Jenkins, Esq., Attorney for State Comptroller; Howland, Murray & Prentice, Esqs., Attorneys for Executors.

Sixth. I further report that I appraised the estate of Charles C. Tiffany, deceased, within the State of New York subject to tax herein, at its fair market value on the 20th day of August, 1907, the date of his death, as follows:

To Laura Wheeler and Charles P. Howland, as executors:

For the benefit of the 5% class..... $51,084.20

Respectfully submitted,
HEADLEY M. GREENE, *Appraiser.*

Dated, New York, November 17, 1909.

37 *Order Fixing the Tax, Entered February 7th, 1910, as Resettled.*

At a Surrogate's Court Held in and for the County of New York at the Hall of Records in the Borough of Manhattan, City of New York, on the 7th Day of February, 1910.

Present: Hon. John P. Cohalan, Surrogate.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

On reading the report of Headley M. Greene, the appraiser, filed herein on the 9th day of December, 1909, wherein it appears that the said decedent died on the 20th day of August, 1907, and on motion of Howland, Murray & Prentice, Attorneys for the executors herein, it is

Ordered and adjudged, that the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the Act relating to taxable transfers, and the tax to which the said transfers are liable are as follows:

Beneficiary.	Cash value of interest.	Tax assessed thereon.
Executors for the benefit of persons of the 5% class	$51,084.20	$2,554.21

JOHN P. COHALAN, *Surrogate.*

38 *Notice of Appeal to Surrogate, Dated April 5th,* 1910.

Surrogate's Court, New York County.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

SIRS: Please take notice that Laura Wheeler and Charles P. Howland, as executors of the last will and testament of Charles C. Tiffany, deceased (who died a resident of the State of Connecticut leaving property within the State of New York) hereby appeal to the Surrogate of the County of New York from the order and determination of Honorable John P. Cohalan, one of the Surrogates of the said County of New York, entered herein on February 7, 1910, as resettled by the order and determination of Honorable Abner C. Thomas, one of the Surrogates of the said County of New York, entered herein on April 1, 1910, fixing the transfer tax upon the estate of said decedent within the State of New York, and that the grounds of such appeal are as follows:

1. That the imposition of so much of said tax as is imposed on account of two promissory notes made by one Edwin B. Sheldon and secured by a lien upon certain real property situated in the State of Illinois, said notes having a value, including accrued interest, of $20,316.67, is illegal, unconstitutional and void:

(*a*) By reason of the fact that it is a tax upon property of
39 the estate of a non-resident decedent not situated within the State of New York within the provisions of the statutes relating to taxable transfers of property, and the amendments thereto, now constituting Section 220 of the Tax Law, being Chapter 62 of the Consolidated Laws:

(*b*) By reason of the further fact that such tax is a taking of property without due process of law within the prohibitions of the Constitution of the United States and of the Constitution of the State of New York.

2. That the imposition of so much of said tax as is imposed on account of four promissory notes made by one George E. Pottinger, a resident of the State of Illinois, and secured by and a lien upon certain real property situated in the State of Illinois, said notes having a value, including accrued interest, of $15,147.91, is illegal, unconstitutional and void.

(*a*) By reason of the fact that it is a tax upon property of the estate of a non-resident decedent not situated within the State of New York within the provisions of the statutes relating to taxable transfers of property, and the amendments thereto, now constituting

Section 220 of the Tax Law, being Chapter 62 of the Consolidated Laws.

(*b*) By reason of the further fact that such tax is a taking of property without due process of law within the prohibitions of the Constitution of the United States and of the Constitution of the State of New York.

3. That the imposition of so much of said tax as is imposed on account of the life interest of Laura Burr Tiffany and Grace Tiffany Maisch in the promissory notes of the Southern Railway Company appropriated by the trustee to the trust created by the Fifth clause of the will of the decedent, which notes were of the value of $9,127.22, is illegal, unconstitutional and void.

(*a*) By reason of the fact that it is a tax upon property of
40 the estate of a non-resident decedent not situated within the State of New York within the provisions of the statutes relating to taxable transfers of property, and the amendments thereto, now constituting Section 220 of the Tax Law, being Chapter 62 of the Consolidated Laws;

(*b*) By reason of the further fact that such tax is a taking of property without due process of law within the prohibitions of the Constitution of the United States and of the Constitution of the State of New York.

4. That the imposition of so much of said tax as is imposed on account of $8,591.67 out of the proceeds of promissory notes of the New York Central & Hudson River Railroad Company, which amount of said proceeds was appropriated by the executors in part satisfaction of the legacy given to said Charles P. Howland under the Twenty-first clause of the will of the decedent in lieu of his commissions as executor and trustee, is illegal, unconstitutional and void;

(*a*) By reason of the fact that it is a tax upon property of the estate of a non-resident decedent not situated within the State of New York within the provisions of the statutes relating to taxable transfers of property, and the amendments thereto, now constituting Section 220 of the Tax Law, being Chapter 62 of the Consolidated Laws;

(*b*) By reason of the further fact that such legacy, being in lieu of executor's and trustee's commissions and not being in excess of the amount prescribed by law for such commissions, is exempt from the payment of any transfer or inheritance tax;

(*c*) By reason of the further fact that such tax is a taking of property without due process of law within the prohibitions of the Constitution of the United States and of the Constitution of the State of New York.

5. That in so far as said tax is calculated upon property of the decedent within the State of New York, without making any
41 allowance for a deduction of three per cent of the value of the property otherwise taxable within the State of New York on account of the expenses necessarily and reasonably incurred by the executors in an attack made upon the probate of the will of the decedent in the Probate Court of the District of Sharon, State of Connecticut, and an appeal from said probate taken to the Superior Court

of said State, the imposition of said tax is illegal, unconstitutional and void:

(*a*) By reason of the fact that it is a tax upon property of the estate of a non-resident decedent not situated within the State of New York within the provisions of the statutes relating to taxable transfers of property, and the amendments thereto, now constituting Section 220 of the Tax Law, being Chapter 62 of the Consolidated Laws;

(*b*) By reason of the further fact that by the law of the State of Connecticut, which is the law of the testator's domicile, the expenses of an executor in defending a will are chargeable pro rata against the respective shares of the devisees and legatees under said will and, therefore, do not constitute any part of the property passing to the said legatees and devisees by virtue of said will;

(*c*) By reason of the further fact that such tax is a taking of property without due process of law within the prohibitions of the Constitution of the United States and of the Constitution of the State of New York.

Dated New York, April 5th, 1910.

Yours, &c.,

HOWLAND, MURRAY & PRENTICE,
Attorneys for Executors.

35 Wall Street, New York City.

To Daniel J. Dowdney, Esq., Clerk of the Surrogate's Court, New York County.

John S. Jenkins, Esq., Attorney for State Comptroller, 165 Broadway, New Yorkk City.

42 *Opinion of Surrogate on First Appeal.*

Estate of Charles C. Tiffany—The promissory notes belonging to the decedent having been located in this State at the time of his death were properly included in the taxable assets of the estate (Matter of Wall, N. Y. Law Journal, January 18, 1905, affirmed without opinion in 105 App. Div. 643; Matter of Bell, Surr. Decs., 1909, p. 162; Blackstone v. Miller, 188 U. S. 189), and this irrespective of the fact that some of the notes were made by a non-resident and secured by a deed of trust covering real estate in a foreign State (Matter of Gibbs, 60 Misc., 645; Matter of Whiting, 150 N. Y., 27; Matter of Morgan, 150 N. Y., 35). The executor in Connecticut incurred certain expenses in opposing objections filed to the probate of the will. As the will was upheld, these expenses are a proper deduction, and the appraiser erred in refusing to deduct from the New York assets the proportionate share of these expenses (Matter of Maresi, 74 App. Div., 76; Matter of Thomas, 39 Misc., 223; Matter of Gihon, 169 N. Y., 443). The order fixing tax will be reversed and the report remitted to the appraised for correction as indicated.

43 *Order of Reversal an First Appeal to Surrogate.*

At a Surrogates' Court Held in and for the County of New York, in the Hall of Records, Borough of Manhattan, on the 30 Day of June, 1910.

Present: Hon. John P. Cohalan, Surrogate.

In the Matter of THE TRANSFER TAX ON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

An appeal having been taken by Laura Wheeler and Charles P. Howland, as executors of the last will and testament of Charles C. Tiffany, deceased, from the order fixing and assessing the transfer tax herein, made and entered in the office of the clerk of this court, on the 7th day of February, 1910, as re-settled by an order made and entered herein in the office of the clerk of this court on the first day of April, 1910, and said appeal having duly come on to be heard,

Now, upon reading the report of Headley M. Green, Esq., the appraiser herein, which report was duly filed in this proceeding on the 9th day of December, 1909, the affidavits and record of the proceedings before the appraiser, both filed with said report, the order of this court dated February 7th, 1910, entered upon said appraiser's report and duly filed in the office of the clerk of this court on that day fixing the tax upon the estate of the above named decedent, as re-settled by an order entered herein in the office of the clerk of this court on the first day of April, 1910, and the notice of ap-
44 peal by the executors of the said decedent from the said order fixing the tax filed in the office of the clerk of this court on the 5th day of April, 1910, which said notice of appeal recites the various grounds on which said appeal was taken, and after hearing Charles P. Howland, Esq., of counsel for the executors in support of the appeal, and Thomas B. Casey, Esq., counsel for the Comptroller of the State of New York in opposition thereto,

Now upon motion of Messrs. Howland, Murray & Prentice, attorneys for the executors, it is

Ordered and adjudged that the order assessing the tax entered herein on the 7th day of February, 1910, as re-settled by the order entered herein on the first day of April, 1910, be and it hereby is reversed, vacated and set aside upon the third ground specified in said notice of appeal, namely the ground that a proportionate share of the expenses incurred by the executors in successfully opposing objections made to the probate of the will in Connecticut are a proper subject of deduction from the assets within the State of New York: and it is further

Ordered and adjudged that the other grounds of appeal specified in said notice of appeal are hereby overruled, and it is further

Ordered and adjudged that the report of the appraiser filed herein on the 9th day of December, 1909, be remitted to him for correction as above indicated.

JOHN P. COHALAN,
Surrogate.

45 *Supplemental Report of Appraiser.*

Surrogates' Court, New York County.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

Supplemental Report.

To the Surrogates' Court of the County of New York:

I, Headley M. Greene, who was heretofore appointed to appraise the estate of the above-named decedent pursuant to Chapter 908 of the Laws of 1906 and the acts amendatory thereof, and supplemental thereto, and who thereafter made and filed my report, viz., on the 9th day of December, 1909, do now make this Supplemental and Amended report, pursuant to an order of Hon. John P. Cohalan, made and entered on the 5th day of July, 1910 (certified copy of which is hereto attached) remitting my first report back to me for the purpose of making certain indicated corrections, as follows:

I hereby confirm the Gross Estate, Real and Personal, of which this decedent died seized and possessed in the State of New York, viz.....		$200,889.14
I hereby confirm the deductions and exemptions from taxation, viz.....	149,804.94	
I hereby increase said deductions and expenses by the proportionate part (45%) payable from the New York estate of the amount of $13,000 incurred by the executors in successfully opposing objections made to the probate of the will in Connecticut, viz.....	5,850.00	
Making the total of deductions and expenses..		155,654.94
leaving a net taxable estate of.....		$45,234.20

instead of $51,084.20, as shown in my former report at page 7, paragraph 2.

2nd. I hereby report the following appearances before me in this supplemental proceeding.

John S. Jenkins, Esq., attorney for State comptroller.

Howland, Murray & Prentice, Esqs., attorney for executors.

3rd. I further report, in place and stead of Paragraph Sixth of my former report, that I have reappraised the estate of Charles C. Tiffany, deceased, subject to tax in this proceeding, at its fair market value on the 20th day of August, 1907, the date of his death, as follows:

Laura Wheeler and Charles P. Howland, as executors, for the benefit of persons of the 5% class.....	$45,234.20

4th. In all other respects I hereby confirm the report hereinbefore made by me in this matter and filed on the 9th day of December, 1909.

Respectfully submitted,

HEADLEY M. GREENE, *Appraiser.*

Dated New York, Nov. 18, 1910.

47 *Order Fixing Tax. Entered December* 13, 1910.

At a Surrogates' Court held in and for the County of New York at the Hall of Records, Borough of Manhattan, on the 12th day of December, 1910.

Present: Hon. Abner C. Thomas, Surrogate.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY.

On reading the amended and supplemental report of Headley M. Greene, Esq., the appraiser filed herein on the thirtieth day of November, 1910, pursuant to an order of Hon. John P. Cohalan, a Surrogate of the County of New York, on the 5th day of July, 1910, remitting the first report of the appraiser filed herein on the 9th day of December, 1909, to him for the purpose of making certain indicated corrections, and it appearing that the said decedent died on the twentieth day of August, 1907, it is on motion of Edward H. Fallows, Esq., attorney for the State Comptroller herein,

Ordered and adjudged that the cash value of the property referred to in the said amended and supplemental report, the transfer of which is subject to the tax imposed by the act relating to taxable transfers, and the tax to which said transfers is subject is as follows:

48

Beneficiary.	Cash value of interest.	Tax assessed thereon.
Laura Wheeler and Charles P. Howland, executors for the benefit of persons of the five per cent. class.....	$45,234.20	$2,261.71

ABNER C. THOMAS, *Surrogate.*

Stipulation in Appellate Division Waiving Certification.

Pursuant to Section 2567 of the Code of Civil Procedure, it is hereby stipulated that the papers as hereinbefore printed, consist of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which the Court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of the Surrogates' Court of the County of New York,

Certification thereof in pursuance of Section 1353 of the Code of Civil Procedure is hereby waived.

Dated New York, February 7th, 1911.

HOWLAND, MURRAY & PRENTICE,
Attorneys for Appellants.

JOHN S. JENKINS,
Attorney for Respondent.

49 *Opinion of the Appellate Division.*

Supreme Court, Appellate Division, First Department, February, 1911.

John Proctor Clarke, Chester B. McLaughlin, Francis M. Scott, Nathan L. Miller, Victor J. Dowling, JJ.

No. 1337.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

Appeal from an Order of the Surrogates' Court Fixing a Transfer Tax.

Mr. Charles P. Howland, for appellants.
Mr. Henry A. Miller, for respondent.

McLAUGHLIN, *J.:*

On the 20th of August, 1907, the decedent, a resident of the State of Connecticut, died owning certain promissory notes which then, and for some time prior thereto had been in a safe deposit box in the City of New York. With two exceptions the notes were made by non-residents, and payment of all of them was secured by property outside of the State of New York. The question presented is whether they are subject to taxation under the Transfer Tax Act of this State. This Act (Sec. 220, Chap. 62 of the Consolidated Laws) so far as material, provides that: "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of
50 the value of $500 or over, or of any interest therein * * * in the following cases * * *

2. When the transfer is by will or intestate law of property within the State, and the decedent was a non-resident of the State at the time of his death."

It is admitted that the transfer was by will and that the decedent, at the time of his death, was a non-resident, but it is urged that the notes, the subject matter of the transfer, are at most mere evidences of debts and are not taxable property within the State. It cannot well be doubted that the Legislature of this State is enacting the Transfer Tax Act considered promissory notes properly and intended to impose a tax upon their transfer. Personal property is defined

in Section 39 of the General Construction Law (Chap. 27 of Consolidated Laws) as follows: "The term 'personal property' includes chattels, money, things in action, and all written instruments themselves as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership."

The definition of personal property as thus given is applicable to cases under the Transfer Tax Act (Matter of Jones, 172 N. Y., 575). But notwithstanding the fact that the Legislature intended by the Transfer Tax Act to make promissory notes owned by a non-resident, if located within this State at the time of the owner's death, subject to a transfer tax, nevertheless it is claimed that it failed to accomplish that purpose for want of power.

In Matter of Whiting (150 N. Y., 27) it was decided that bonds of foreign as well as domestic corporations, and certificates of stock of domestic corporations owned by a non-resident decedent and deposited by him in a safe deposit box in this State, were, at the time of his death, taxable under the Transfer Tax Act. Judge
51 Vann, who delivered the opinion of the court, said: "The law clearly distinguishes 'written instruments themselves' from the 'rights or interests to which they relate' * * * and makes either taxable. * * * There is obvious propriety in subjecting the instrument of transfer to a transfer tax when it is left in this State for safe keeping it is subject to the jurisdiction of our laws, and hence is within the intent of the Transfer Tax Act. When the design of the Legislature is to tax the transfer of everything that it has power to tax, there is no inconsistency in taxing one form, if another is not available. Indeed, perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape that can be owned or transferred. Thus, the Legislature intended, as I think, to repeal the maxim mobila personam sequuntur, so far as it was an obstacle and to leave it unchanged so far as it was an aid to the imposition of a transfer tax upon all property in any respect subject to the laws of this State."

So far as this court is concerned, the identical question here presented has already been passed upon (Estate of Wall, 105 App. Div., 643). There, promissory notes made by a non-resident to a non-resident were, at the time of the latter's death, found in his safe deposit box in this State. A majority of the court held that such notes were property having a situs in this State and therefore liable to taxation. See also Matter of Fearing (N. Y. Law Journal, January 28, 1911).

But it is said that since the decision in Matter of Wall (supra) the Supreme Court of the United States has decided (Buck vs. Beach, 206 U. S., 392) that promissory notes, situated as the notes here in question, are not taxable. I do not think that decision is applicable to the question here presented, and if so, is distinguishable. The Buck case simply held that the State of Indiana did not have the

power to impose a general tax upon promissory notes made by a non-resident, payable to a non-resident, simply because they were present in the State. There, the attempt was to levy a tax upon prop-
52 erty, while here it is to impose a tax upon the transfer or right of succession. Judge Peckham, who delivered the opinion, was careful to point out the distinction. He said: "Cases arising under collateral inheritance tax or succession tax acts have been cited as affording foundation for the right to tax as herein asserted. The foundation upon which such acts rest is different from that which exists where the assessment is levied upon property. The succession or inheritance tax is not a tax on property, as has been frequently held by this Court, Knowlton vs. Moore, 178 U. S., 41, and Blackstone vs. Miller, 188 U. S., 189, and therefore the decisions arising under such inheritance tax cases are not in point."

In Blackstone vs. Miller, referred to by Judge Peckham, the question was whether a deposit in a New York Bank, belonging to a non-resident decedent, was subject to tax under the New York Transfer Tax Act, and the claim was there made that such deposit was a mere credit and that the situs of the property was not in the State. Judge Holmes, in disposing of the question, said: "We perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim mobilia sequuntur personam has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition the fiction must give way. * * * Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it * * *."

In New Orleans vs. Stempel (175 U. S. 309) it was held that promissory notes had an independent situs of their own and were properly taxed where located. Mr. Justice Brewer, who delivered the opinion of the Court, said: "The same doctrine was affirmed in Fischer vs. Commissioners of Rush County (19 Kansas, 414) and again in Blain vs. Irby (25 Kansas, 499, 501) in which the court said, referring to promissory notes, 'They have such an inde-
53 pendent situs that they may be taxed where they are situated.' The decisions of the highest courts of New York in which State these plaintiffs reside are to the same effect. In People vs. Trustees (48 N. Y., 397) the court said: 'Notes, bonds and other contracts for the payment of money have always been regarded and treated in law as personal property. They represent the debts secured by them, they are the subject of larceny, and a transfer of them transfers the debt. * * * And while for some purposes in the law, by legal fiction, it follows the person of the creditor, and exists where he may be, yet it has been settled that for the purpose of taxation this legal fiction does not, to the full extent, apply and that such property belonging to a non-resident creditor may be taxed in the place where the obligations are held by his agent. * * * It is well settled that bank bills and municipal bonds are in such a concrete, tangible form that they are subject to taxation where

found, irrespective of the domicile of the owner; are subject to levy and sale on execution; and to seizure and delivery under replevin, and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation."

In Selliger vs. Kentucky (213 U. S. 200) Judge Holmes, who wrote the opinion in the Blackstone case, referred to Buck vs. Beach (supra) and in such a way that I cannot believe he considered the decisions theretofore made, with reference to promissory notes being taxable under the Transfer Tax Act, had been overruled. He said: "Bonds can be taxed where they are permanently kept, because by a notion going back to very early law the obligation is, or originally was, inseparable from the paper or parchment which expressed it (Buck vs. Beach, 206 U. S. 392, 403, 413). That case and
54 the authorities cited by it, show how far a similar notion has been applied to negotiable bills and notes."

In the foregoing discussion I have treated all of the notes alike, but it is to be noted that two of them, aggregating, with principal and interest upwards of $20,000, are made by a resident of the State of New York. It is possible they should be treated differently, but it does not seem to me that the residence of the debtor can change the character of property or determine whether it is liable to an inheritance tax.

In view of the foregoing I am of the opinion that the order appealed from is right and should be affirmed with $10 costs and disbursements.

Clarke & Dowling, JJ., concur.

55 *Dissenting Opinion in the Appellate Division.*

Supreme Court, Appellate Division, First Department, February, 1911.

John Proctor Clarke, Chester B. McLaughlin, Francis M. Scott, Nathan L. Miller, Victor J. Dowling, JJ.

No. 1337.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

Appeal from order of Surrogate affirming prior order.

Mr. Charles P. Howland, for appellants.
Mr. Henry A. Miller, for respondent.

MILLER, *J.* (dissenting):

The precise question involved on this appeal is whether promissory notes kept for safe keeping in a safe deposit box in this State,

made by a non-resident, and owned by a non-resident decedent, are subject to taxation under Section 220, Chapter 62, of the Consolidated Laws, which so far as material is as follows:"

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of $500 or over, or of any interest therein * * * in the following cases: * * *

"2. When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death."

This court in this department has passed on the question in favor of the right to impose the tax. (Matter of Wall, 105 App. Div., 643.) Irrespective of my individual opinion, I should be willing to follow that decision but for what I regard to be a controlling decision of the United States Supreme Court. (Buck v. Beach, 206 U. S., 392.) That case involved the right of the State of Indiana to tax notes, physically present in said State, but which were given and payable in Ohio by residents of the latter State to a resident of New York. It was held that the State of Indiana had no power to impose the tax, and that the enforcement of it would be the taking of property without due process of law. That case is not to be distinguished by the fact that the statutory definition of "personal property" (see General Construction Law, Chap. 27, Consolidated Laws, Sec. 39), includes promissory notes, as distinguished from the debts evidenced by them, because the decision of the state court that there was statutory authority of the State of Indiana for the imposition of the tax was conclusive upon the United States Supreme Court. Independently of the statutory definition of personal property, it is reasonably certain that the Legislature of this State intended by the Transfer Tax Law to reach every transfer which the State had the power to tax, to apply the maxim mobilia sequuntur personam in the case of resident decedents and to reject it in the case of non-resident decedents. So the question is not one of construction but of power.

It is not always easy to determine the actual situs for purposes of taxation of intangible property. The decisions on the subject are not altogether harmonious. Distinctions have been drawn, notably between specialty and simple contract debts, which it might be difficult logically to support, except possibly upon archaic notions as to the effect of a seal. I do not discuss the question, because it involves a federal question, and the decision in Buck v. Beach forecloses debate in this court upon the point that promissory notes, as distinct from the debts evidenced by them, are not property in the sense that they are subject to taxation as such in the state in which they are physically present.

That case is to be distinguished from this, if at all, upon the ground that it involved a property tax, whereas, this involves a transfer or succession tax. In the course of his opinion in that case, Mr. Justice Peckham did refer to the fact, that there was a distinction between property and succession taxes, and say that the inheritance tax cases were not in point, from which it is inferred that, had the case involved a succession tax, a different result would have been

reached. But in the last analysis, it will be found that there is no rational distinction, so far as the question before us is concerned, between a property tax and a succession tax upon the transfer of the personal property of a non-resident decedent.

While rejecting the maxim mobilia sequuntur personam in the case of non-resident decedents, the law of this State is that the universal succession occurs in the State of the domicile. The right of succession then in this case was conferred by the State of Connecticut. The State of New York may tax the exercise of that right perforce only of its power to do so. If the State has jurisdiction of the property so that ancillary administration here may be necessary to reduce it to possession, it may demand a tax as a condition of allowing the enjoyment of a right, which, as a matter of comity, it admits was conferred, and is governed by the laws of another state. But in order to interpose between a right granted by another state and the enjoyment of that right, it is absolutely essential that it have jurisdiction of the property affected. The case is thus brought squarely within the decision in Buck v. Beach, supra. If the State has not jurisdiction of the property, so as to enable it to impose a property tax, it cannot have jurisdiction to impose a tax as a condition of allowing a transfer of it according to the laws of another state. The transfer in such case is beyond the power of this
58 State, and will occur irrespective of the attitude of this State.

While I accept without re-examination as the promise of my argument the principle of Buck v. Beach, it may not be amiss to call attention to the practical side of the question. It results from the two theories of imposing inheritance taxes that a right of succession may legally be taxed twice, once in the State of the decedent's domicile, and again in the State where the property has a situs for the purpose of taxation, but it has not yet been held that the right may be taxed still a third time in a State where the evidence of a debt happens to be. If the debtor in this case refuses to pay, ancillary administration in the State of Illinois may be necessary. The debt exists apart from the instrument, because a recovery might be had without producing the instrument. If the State of New York should seize the piece of paper, non constat, the debt could be established by other evidence. The decedent's successor will not have to ask the aid of this State or claim the protection of its laws. Surely, with the principle of Blackstone v. Miller, (188 U. S. 189), the State of Illinois has the right to impose a tax on the transfer of these notes, a cogent, if not a conclusive reason for thinking that the State of New York has no such right; for though double taxation is permissible, it has not yet been held that even intangible property can have a situs for purposes of taxation in more than one State apart from the domicile of the owner. If the debtor resided in this State, it would undoubtedly claim, and have the means of enforcing payment of a tax, a practical reason for not undertaking to impose a tax which it might be unable to collect. The right of the State to impose transfer taxes on the entire estate of resident decedents and on the property within the State of non-resident decedents necessarily

depends on inconsistent theories, but there should be some consistency in the application of those theories.

Scott, J., concurs.

59 *Order of Appellate Division Appealed From.*

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 10th day of March, 1911.

Present:

Hon. Jorn Proctor Clarke,
" Chester B. McLaughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling, Justices.

1337.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

Order of Affirmance on Appeal from Surrogate.

An appeal having been taken to this Court from an order of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 24th day of January, 1911, by Laura Wheeler and Charles P. Howland, as executors, etc., and said appeal having been argued by Mr. Charles P. Howland of counsel for the appellant, and by Mr. Henry A. Miller, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered and adjudged that the order so appealed from be and the same is hereby affirmed with $10 costs and disbursements.

Enter,

G. L. I.

60 *Notice of Appeal to Court of Appeals.*

Supreme Court, Appellate Division, First Department.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

Please take notice that Charles P. Howland and Laura Wheeler, as Executors of the Last Will and Testament of Charles C. Tiffany, deceased, hereby appeal to the Court of Appeals of the State of New York from the order entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on March 10, 1911, affirming the order entered herein in the office of the Clerk of the Surrogate's Court in the County of New

York on January 24th, 1911, affirming the previous order made by the Surrogate of New York County on December 13th, 1910, fixing the transfer tax upon the estate of the above named decedent, which said order of affirmance was duly entered in the office of the Clerk of the Surrogate's Court in New York County on March 17th,
61 1911. And said executors appeal from each and every part of said order.

Dated New York, March 31, 1911.

Yours, &c.,

HOWLAND, MURRAY & PRENTICE,
Att'ys for Appellants.

Office and Post Office Address, No. 35 Wall Street, New York City.

To—

John S. Jenkins, Esq., Attorney for State Comptroller, 165 Broadway, New York City.

Alfred Wagstaff, Esq., Clerk of the Appellate Division of the Supreme Court, First Department.

Daniel J. Dowdney, Esq., Clerk of the Surrogate's Court.

Stipulation Waiving Certification.

Court of Appeals, State of New York.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

It is hereby stipulated under Section 3301 of the Code of Civil Procedure that the papers on the appeal as hereinbefore printed consist of true and correct copies of the order of the Appellate
62 Division of the Supreme Court in and for the first judicial department, dated March 10th, 1911, being the order appealed from, the notice of appeal therefrom, and all the papers upon which the court below acted in making the order appealed from, and the whole thereof (all of which papers are now on file in the office of the Surrogates of the County of New York), and of the opinion of the majority in the Appellate division and the dissenting opinion in the Appellate division.

It is also consented that the foregoing papers be filed as the case on appeal herein to the Court of Appeals, and that the same contain all the evidence and other papers material to this appeal to the Court of Appeals.

Certification in pursuance of Section 1315 of the Code of Civil Procedure, or otherwise, is hereby waived.

Dated, April 12, 1911.

HOWLAND, MURRAY & PRENTICE,
Attorneys for Appellant.

JOHN S. JENKINS, *Attorney for Respondent.*

[New York Surrogate's Seal.]

63 At a Term of the Surrogate's Court held in and for the County of New York at the Hall of Records, Borough of Manhattan, City of New York, on the 23rd day of May, 1911.

Present: Hon. John P. Cohalan, Surrogate.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF CHARLES C. TIFFANY, Deceased.

An order in this proceeding having been entered in this court on the 13th day of December, 1910, fixing and assessing the transfer tax on the estate of the above named decedent and an appeal having been taken from said order to the Surrogate by Laura Wheeler and Charles P. Howland, as executors of the last will and testament of Charles C. Tiffany deceased, and an order having been entered in this court on the 24th day of January, 1911, affirming said order of the 13th day of December 1910, fixing the tax upon the transfer of property belonging to the above named decedent, and an appeal having been taken from said order entered as aforesaid, in this court on January 24th, 1911, to the Appellate Division of the Supreme Court, First Department by the executors, and an order having been entered in the office of the clerk of said court on the 10th day of March, 1911, affirming the order of the Surrogate appealed from and dated January 23rd, 1911, and an appeal having been taken from said order of the Appellate Division to the Court of Appeals by the said executors, and the remittitur having been sent down from the said Court of Appeals and duly filed in this court on the 18th day of May
64 1911, by which remittitur it appears that the said order of the Appellate Division of the Supreme Court, First Judicial Department and said final order of the Surrogate entered in the office of the Surrogate on January 24th, 1911, have been affirmed by said Court of Appeals, and the said order of the Surrogate entered in the office of the Surrogate on December 13th, 1910, fixing and assessing the tax upon the estate of the above named decedent, made upon the report of the appraiser has been duly affirmed with costs to the Comptroller of the State of New York by said Court of Appeals, and that the record and proceedings have been directed by said Court of Appeals to be remitted to this Court and this Court directed to enforce the said judgment of the Court of Appeals, according to law,

Now therefore, upon motion of John S. Jenkins Attorney for the Comptroller of the State of New York, it is Ordered and Adjudged that the order and judgment of the said Court of Appeals be and the same is hereby made the order and judgment of this court; and it is further

Ordered and Adjudged that the respondent herein, the Comptroller of the State of New York, recover from the appellants herein, Laura Wheeler and Charles P. Howland, as executors of the last will and testament of Charles C. Tiffany deceased, the sum of One hundred and fifty three and 60/100 ($153.60) dollars, the amount of his costs and disbursements as taxed in this proceeding.

[New York Surrogate's Seal.]

JOHN P. COHALAN,
Surrogate.

65 All which we have caused by these presents to be exemplified, and the Seal of our said Surrogates' Court to be hereunto affixed.

Witness, Hon. Robert Ludlow Fowler, a Surrogate of the County of New York, at The City of New York, the thirteenth day of June in the year of our Lord one thousand nine hundred and eleven and of our independence the one hundred and thirty fifth.

[New York Surrogate's Seal.]

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

I, Robert Ludlow Fowler, a Surrogate of said County and presiding Magistrate of the Surrogates' Court, do hereby certify that Daniel J. Dowdney, whose name is subscribed to the preceding exemplification, is the Clerk of said Surrogates' Court of the County of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogates' Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York, June 13th, 1911.

ROBERT LUDLOW FOWLER, *Surrogate.*

STATE OF NEW YORK,
County of New York, ss:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of the County of New York, do hereby certify that Hon. Robert Ludlow Fowler, whose name is subscribed to the preceding certificate, is the presiding Magistrate of the Surrogates' Court of the County of New York, duly appointed, sworn and qualified, and that the signature of said Magistrate to said certificate is genuine.

In Testimony Whereof, I have hereto set my hand and affixed the seal of the said Court, this 13th day of June, 1911.

[New York Surrogate's Seal.]

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

66 STATE OF NEW YORK,
Court of Appeals, State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of decision in the case of In re Transfer Tax on Estate of Charles C. Tiffany decided by the Court of Appeals on the 9th day of May, 1911, with the official decision rendered in such case, and I further certify that the same is a true and correct copy of said decision and of each and every part thereof. That no opinion other than as stated in said decision has been handed down therein.

In witness whereof, I have hereunto affixed my signature as Re-

porter of the Court of Appeals, at the City of Albany, in the State of New York, this 8th day of June, 1911.

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:

[Seal State of New York Court of Appeals.]

[L. S.] R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official decision rendered in the case of In re Transfer Tax on Estate of Charles C. Tiffany decided by the said Court of Appeals on the 9th day of May, 1911, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 8th day of June in the year of one thousand, nine hundred and eleven.

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals of the State of New York.

67 STATE OF NEW YORK,
Court of Appeals, Reporter's Office:

ALBANY, —— —, 191–.

282.

In re TRANSFER TAX ON ESTATE OF CHARLES C. TIFFANY, Dec'd.

Order affirmed with costs.
On opinion of McLaughlin, J., below.
Concur: C., Ch. J.; Ha., V., W., His., Col., JJ.
Absent: G., J.

68 The people of the State of New York, by the Grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye, That we having examined the records and files in the office of the Surrogate of the County of New York, do find there remaining, a certain record of the Petition for Writ of Error and Bond in the Matter of the Appraisal under the Act in relation to Taxable Transfers of property of the property of Charles C. Tiffany, deceased, in the words and figures following to wit:

[New York Surrogate's Seal.]

69 SURROGATE'S COURT,
County and State of New York:

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO Taxable Transfers of Property of the Property of Charles C. Tiffany, Deceased.

Petition for Writ of Error.

Come now Laura Wheeler and Charles P. Howland, executors of the last will and testament of Charles C. Tiffany, late of the Village of Sharon in the State of Connecticut, deceased, by their attorneys, and complain that in the record of proceedings had in the above entitled cause in the Court of Appeals in the State of New York, which was the highest court of law and equity in said state in which a decision could be had, and which has remitted the record of proceedings in said court to the Surrogate's Court for the County and State of New York, there to be proceeded upon according to law, and also in the rendition of the judgment or decree in the above entitled cause in said Surrogate's Court for the County of New York on the 23d day of May, wherein was drawn in question the validity of a statute of said state and of an authority exercised thereunder on the ground of their being repugnant to the constitution or the laws of the United States, and the decision was in favor of such their validity, manifest error hath happened to the great damage of said Laura Wheeler and Charles P. Howland as executors as aforesaid.

70 Wherefore the said Laura Wheeler and Charles P. Howland as such executors pray for the reversal of said judgment or decree and for the allowance of a writ of error, and for such other orders and process as may cause such error to be corrected by the Supreme Court of the United States.

Dated this 23rd day of May, 1911.

LAURA WHEELER AND
CHARLES P. HOWLAND,
As Executors, etc., of Charles C. Tiffany, Deceased,
By HOWLAND, MURRAY & PRENTICE,
Their Attorneys.

Allowed May 29th, 1911.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

STATE OF NEW YORK,
County of New York, ss:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of said County, do hereby certify that I have compared the foregoing copy of the Petition for Writ of Error in the Matter of the estate of Charles C. Tiffany, deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Surrogates' Court of the County of New York, this 12th day of June in the year of our Lord one thousand nine hundred and eleven.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

71 SURROGATES' COURT,
County of New York:

In the Matter of THE ESTATE OF CHARLES C. TIFFANY, Deceased:
LAURA WHEELER and CHARLES P. HOWLAND, Executors.

Know all men by these presents, That the National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, of New York, County and State of New York, is held and firmly bound unto William Sohmer, Comptroller of the State of New York, or his successors in office, in the sum of One Thousand & 00/100 (1,000.00) Dollars, to be paid to the said William Sohmer or his successors in office, for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal, and dated this 23rd day of May, in the year of our Lord one thousand nine hundred and eleven.

Whereas, the above named Laura Wheeler and Charles P. Howland, Executors, have prosecuted a Writ of Error to the Supreme

Court of the United States, to reverse the Order rendered in the above entitled estate by one of the Surrogates of the County of New York, May 23rd, 1911.

Now, therefore, the condition of this obligation is such, that if the above named Laura Wheeler and Charles P. Howland, Executors, shall prosecute the Writ of Error to effect, and answer all damages and costs if they fail to make it good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Dated New York, May 23rd, 1911.

NATIONAL SURETY COMPANY.
By ARTHUR P. WEST, *Res. Vice President.*

Attest:

[L. S.] M. W. GEWECKE,
Res. Ass't Secretary.

Approved May 29th, 1911.
CHARLES E. HUGHES.
Associate Justice of the Supreme
Court of the United States.

72 STATE OF NEW YORK,
County of New York, ss:

On this 23rd day of May, 1911, before me personally appeared Arthur P. West, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instruments; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720, of New York Session laws of 1893. And the said Arthur P. West further said that he is acquainted with M. W. Gewecke and knows him to be the Res. Assistant Secretary of said Company; that the signature of the said M. W. Gewecke subscribed to the said instrument is in the genuine handwriting of the said M. W. Gewecke and was hereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Res. Vice-President.

[L. S.] ETTA B. GEWECKE,
Notary Public, exc.

Copy of By-Law.

Be it remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the fourth day of February, 1908, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII. SEC. 1. *Signatures Required.*—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof shall be signed by the President, a Vice-President, a Resident Vice-President or Attorney-in-Fact, and except when signed by an Attorney-in-Fact shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated or not; and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent, or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the Company as if the same were signed by the President and duly sealed and attested by the Secretary."

STATE OF NEW YORK,
County of New York, ss:

I, M. W. Gewecke, a Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of Article XIII, Section 1 of said original By-Law.

Given under my hand and seal of the Company in the County of New York, this 23rd day of May, 1911.

[L. S.]

M. W. GEWECKE,
Resident Ass't Secretary.

STATE OF NEW YORK,
County of New York, ss:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of said County, do hereby certify that I have compared the foregoing copy of the Bond in the matter of the estate of Charles C. Tiffany, deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Surrogates' Court of the County of New York, this 12th day of June in the year of our Lord one thousand nine hundred and eleven.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

73 All which we have caused by these presents to be exemplified, and the Seal of our said Surrogates' Court to be hereunto affixed.

Witness, Hon. Robert Ludlow Fowler, a Surrogate of the County of New York, at The City of New York, the thirteenth day of June in

the year of our Lord one thousand nine hundred and eleven and of our Independence the one hundred and thirty fifth.

[New York Surrogate's Seal.]

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

I, Robert Ludlow Fowler a Surrogate of said County and residing Magistrate of the Surrogates' Court, do hereby certify that Daniel J. Dowdney, whose name is subscribed to the preceding exemplification, is the Clerk of said Surrogates' Court of the County of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogates' Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York, June 13th, 1911.

ROBERT LUDLOW FOWLER, *Surrogate.*

STATE OF NEW YORK,
County of New York, ss:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of the County of New York, do hereby certify that Hon. Robert Ludlow Fowler, whose name is subscribed to the preceding certificate, is the presiding Magistrate of the Surrogates' Court of the County of New York, duly appointed, sworn and qualified, and that the signature of said Magistrate to said certificate is genuine.

In Testimony Whereof, I have hereto set my hand and affixed the seal of the said Court, this 13th day of June 1911.

[New York Surrogate's Seal.]

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

74 [Endorsed:] Surrogates' Court, County of New York. In the Matter of the Estate of Charles C. Tiffany, Deceased. (Exemplified copy.)

75 The People of the State of New York by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

[New York Surrogate's Seal.]

Know Ye, That we having examined the records and files in the office of the Surrogate of the County of New York, do find there remaining, a certain record of Assignment of Errors in the matter of the estate of Charles C. Tiffany, deceased, in the words and figures following to wit:

76 Surrogate's Court, County and State of New York.

In the Matter of The Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Charles C. Tiffany, Deceased.

Assignment of Errors.

Now come Laura Wheeler and Charles P. Howland, as Executors of the last will and testament of Charles C. Tiffany, deceased, by Howland, Murray & Prentice, their attorneys, and say that in the record and proceedings in the above entitled matter there is manifest error in this, to wit:

First. That so much of the property which was the subject of taxation in the above entitled cause as consisted of the promissory notes of George E. Pottinger and the promissory notes of the Southern Railway Company, were situated either in the state of Connecticut, where Charles C. Tiffany, the above named decedent resided at the time of his death, or in the state of Illinois and the state of Virginia respectively, the states of residence of the respective obligors upon said promissory notes; that none of said property was situated in the state of New York at the time of said decedent's death, and that accordingly the tax laws of the state of New York have no application thereto, and the courts of the state of New York have no jurisdiction to assess a tax upon said property, or upon the transfer or inheritance thereof, or succession thereto.

77 Second. That the promissory notes of Edwin B. Sheldon which were held to be subject to taxation in the above entitled cause were situated either in the state of Connecticut, where Charles C. Tiffany, the above named decedent, resided at the time of death, or in the state of Illinois, where they were secured by deed of trust of real property made to a resident of the state of Illinois; that none of said property was situated in the state of New York at the time of said decedent's death, and that accordingly the tax laws of the state of New York have no application thereto, and the courts of the state of New York have no jurisdiction to assess a tax upon said property, or upon the transfer or inheritance thereof, or succession thereto.

Third. That the statute of the state of New York relating to taxable transfers of property as applied to the facts and circumstances of this case and the authority exercised under said statute as interpreted by the decision and judgment herein are unconstitutional and void on the ground that they are repugnant to section 1 of Article XIV in amendment of the Constitution of the United States, in that the said statute deprives the said executors of their property and of the property of the estate without due process of law.

Fourth. That the court should have dismissed the proceeding to impose a transfer tax upon the property in question.

Wherefore the said Laura Wheeler and Charles P. Howland as executors of the last will and testament of Charles C. Tiffany,
78 deceased, as aforesaid, pray that the judgment and decision herein of the Court of Appeals of the state of New York, and

the judgment or decree rendered by the Surrogate's Court of the County of New York on the remittitur of said Court of Appeals of the state of New York, be reversed, and that said proceeding be dismissed.

Dated, May 23d, 1911.

HOWLAND, MURRAY & PRENTICE,
Attorneys for Laura Wheeler and Charles P. Howland, Executors, etc., of Charles C. Tiffany, Deceased.

79 All which we have caused by these presents to be exemplified, and the Seal of our said Surrogates' Court to be hereunto affixed.

Witness, Hon. Robert Ludlow Fowler, a Surrogate of the County of New York, at The City of New York, the 14th day of June in the year of our Lord one thousand nine hundred and eleven and of our Independence the one hundred and thirty-fifth.

[New York Surrogate's Seal.]

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

I, Robert Ludlow Fowler a Surrogate of said County and presiding Magistrate of the Surrogates' Court, do hereby certify that Daniel J. Dowdney, whose name is subscribed to the preceding exemplification, is the Clerk of said Surrogates' Court of the County of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogates' Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York, June 14th, 1911.

ROBERT LUDLOW FOWLER, *Surrogate.*

STATE OF NEW YORK,
County of New York, ss:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of the County of New York, do hereby certify that Hon. Robert Ludlow Fowler, whose name is subscribed to the preceding certificate, is the presiding Magistrate of the Surrogates' Court of the County of New York, duly appointed, sworn and qualified, and that the signature of said Magistrate to said certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, this 14" day of June 1911.

[New York Surrogate's Seal.]

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

80 [Endorsed:] Surrogates' Court, County of New York. In the Matter of the Estate of Chas. C. Tiffany, Deceased. (Exemplified copy.)

81 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the surrogates of the County of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said surrogate's court in and for the county of New York, State of New York, before you or one of you, having been remitted to you by the court of appeals of said State, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled In the matter of the appraisal under the act in relation to taxable transfers of property, of the property of Charles C. Tiffany, deceased, wherein was drawn in question the validity of a treaty, or statute, of, or an authority exercised under, the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution of, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of

82 Laura Wheeler and Charles P. Howland as executors of the last will and testament of Charles C. Tiffany, deceased, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court, at Washington within thirty days from the date hereof, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States the twenty-ninth day of May in the year of our Lord one thousand nine hundred and eleven.

[Seal of the Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

Allowed by

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

83 [Endorsed:] Supreme Court of the United States. In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property, of the Property of Charles C. Tiffany, deceased. Writ of error. Howland, Murray & Prentice, Attorneys for Executors, 35 Wall Street, New York.

84 UNITED STATES OF AMERICA, *ss:*

To William Sohmer, comptroller of the State of New York:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the surrogate's court in and for the county of New York wherein Laura Wheeler and Charles P. Howland as executors of the last will and testament of Charles C. Tiffany, deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Hughes, associate justice of the Supreme Court of the United States this twenty-ninth day of May in the year of our Lord one thousand nine hundred and eleven.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

85 STATE OF NEW YORK,
County of New York, ss:

William Roberts, being duly sworn, says that he is a clerk in the office of Howland, Murray & Prentice, and that he is more than twenty-one years of age; that on June 1, 1911, between the hours of one and two o'clock P. M. he served upon Julius Harburger, a deputy comptroller of the State of New York at his office No. 165 Broadway, Borough of Manhattan, New York City, a copy of the within citation by delivering to and leaving a copy of said citation with the said Julius Harburger; that he knew the person upon whom he served said citation to be Julius Harburger and a deputy Comptroller of the State of New York.

WILLIAM ROBERTS.

Sworn to before me, this 2nd day of June, 1911.

[Seal Lucius A. Wilson, Notary Public, Kings County.]

LUCIUS A. WILSON,
Notary Public, Kings County.

Certificate filed in New York County, State of New York.

86 [Endorsed:] Supreme Court of the United States. In the Matter of the Appraisal under the Act in Relation to

Taxable Transfers of Property, of the Property of Charles C. Tiffany, deceased. Citation. Howland, Murray & Prentice, Attorneys for Executors, 35 Wall Street, New York. Service of a copy of within citation admitted June 1st, 1911. John S. Jenkins, Att'y for Comptroller.

Endorsed on cover: File No. 22,743. New York Surrogates' Court, New York County. Term No. 667. Laura Wheeler and Charles P. Howland, executors of the last will and testament of Charles C. Tiffany, deceased, plaintiffs in error, vs. William Sohmer, comptroller of the State of New York. Filed June 20th, 1911. File No. 22,743.

Supreme Court, U. S.
FILED
OCT 2 1911
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 964. 45

LAURA WHEELER and CHARLES P. HOWLAND,
Executors of the Last Will and Testament of
Charles C. Tiffany, deceased,
Plaintiffs in Error,

against

WILLIAM SOHMER, Comptroller of the State of New York,
Defendant in Error.

MOTION TO ADVANCE.

CHARLES P. HOWLAND,
Counsel for Plaintiffs in Error.

HENRY A. MILLER,
Counsel for Defendant in Error.

C. G. Rumsey, 30 to 36 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 667.

LAURA WHEELER and CHARLES P. HOWLAND, Executors of the last Will and Testament of Charles C. Tiffany, deceased,
PLAINTIFFS IN ERROR.

AGAINST

WILLIAM SOHMER, Comptroller of the State of New York,
DEFENDANT IN ERROR.

MOTION TO ADVANCE.

And now come the plaintiffs in error and the defendant in error, and jointly move the court that this cause be advanced on the docket and set down for a hearing upon a day certain.

STATEMENT OF FACTS.

The plaintiffs in error herein are the executors of Charles C. Tiffany, deceased, who died a resident of and domiciled in the State of Connecticut, and at the time of his death owned, held and had deposited for safe keeping in a safe deposit box of the Fifth Avenue Trust Company in the City of New York, promissory notes made by persons residents of and domiciled in the State of Illinois and secured by land situated in the State of Illinois, and other promis-

sory notes made by non residents of the State of New York, not secured in any manner.

A transfer tax was assessed upon these notes by the transfer tax appraiser for the County of New York under the following provisions of the law of the State of New York relating to taxable transfers in force at the date of the death of the decedent (Sections 220 of the Tax Law, Chapter 62 of the Consolidated Laws of 1909):

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein---------- in the following cases :
>
> 2. When the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state at the time of his death."

The plaintiff in error opposed the assessment of the tax on the following grounds : 1. That the credits evidenced by these notes are not "property within the state" and not subject to a transfer tax under the statute in question. 2. That the statute, if construed to include these notes, imposes a tax upon personal property located outside of the state, or on account of succession to such property, the owner of which was domiciled elsewhere ; that it is taxation without jurisdiction, and the statute is unconstitutional in that it deprives the beneficiaries of the estate of the decedent of property without due process of law in violation of the 14th amendment of the constitution of the United States. The Court of Appeals of the State of New York sustained the validity of the tax on these notes. This court has decided in Buck vs. Beach, 206 U. S., 392, that a statute of Indiana is unconstitutional which subjects to an annual tax promissory notes owned by a resident of New York, made by residents of Ohio, secured by mortgages on land in Ohio, and deposited with an agent of the owner in Indiana.

SPECIAL AND PECULIAR REASONS FOR ADVANCEMENT OF THIS CASE.

1. Promissory notes, similar to the notes herein involved, are frequently deposited by non-residents for safe keeping in the safe deposit boxes in the large cities of the various states, and the aggre-

gate value of notes so deposited is great. Most states have enacted inheritance tax laws similar to the statute under which the present tax was assessed. The validity of the tax in this case presents a question of general public interest, and of great importance, not only to the state of New York and to the plaintiffs in error herein, but to all states which have enacted succession, inheritance or transfer tax laws and to the citizens thereof.

2. A considerable number of estates in the state of New York include promissory notes of the character of those involved in this case, and the executors of those estates are delaying the institution or the completion of transfer tax proceedings pending the decision by this court of the question presented in this case.

3. Estates including such promissory notes are constantly passing through inheritance or transfer tax proceedings in the various states, and the executors are constantly paying the taxes in such proceedings upon the amount of such notes with or without protest. If such a tax is unconstitutional the collection of such taxes by state officials is an act of injustice, and the amount of the interests involved requires that the question receive the attention of this court at as early a day as possible consistent with its practice and convenience and the views of the public interest.

4. It is the practice of this court to hear out of their order on the docket cases involving phases of the inheritance or succession laws of the states. Such a motion was granted in Scudder vs. Comptroller, 175 U. S., 32; Orr vs. Gilman, 183 U. S., 278; Blackstone vs. Miller, 188 U. S., 189.

Charles P. Howland

Counsel for Plaintiffs in Error.

Henry A. Miller

Counsel for Defendant in Error.

Supreme Court, U. S.
FILED.
SEP 18 1913
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1913

No. 45

LAURA WHEELER AND CHARLES P. HOWLAND, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES C. TIFFANY, DECEASED,

Plaintiffs-in-Error.

against

WILLIAM SOHMER, COMPTROLLER OF THE STATE OF NEW YORK,

Defendant-in-Error.

In Error to the Surrogate's Court of New York County, State of New York.

BRIEF AND ARGUMENT

For Executors, Plaintiffs-in-Error.

CHARLES P. HOWLAND,
For Executors, Plaintiffs-in-Error.

SUBJECT INDEX.

	PAGE
Statement of the case	1
Specification of error	3
Brief	5
Argument	10
Jurisdiction for taxing purposes	10
Promissory notes are only evidences of debt	10
Tests to determine jurisdiction of state to tax	16
Bonds and notes distinguished in regard to situs	19
Taxation and protection—correlatives	22
Appendix	26
Origin of bonds	26
Origin of notes	29
Consequent distinctions	31
(*a*) Remedies	31
(*b*) Statute of limitations	35
(*c*) Administration of estates	35
(*d*) Absence of consideration	35
(*e*) Situs	36
(*i*) For purposes of administration	36
(*ii*) For purposes of taxation	40

Table of Cases.

PAGE

Attorney General v. Bouwens, 4 M. & W. 171.....6, 12, 37
Beers v. Shannon, 73 N. Y. 292..... 37
Bishop v. Young, 2 B. & P. 78..... 34
Blackstone v. Miller, 188 U. S. 189.....6, 7, 16, 18, 23
Boyd v. Selma, 96 Ala. 144..... 40
Bromwich v. Lloyd, 2 Lutw. fol. 1585..... 30
Brown v. Kennedy, 15 Wall. 591..... 14
Brown v. London, 1 Vent. 132; 1 Lev. 298; 1 Mod. 285..... 34
Brown v. Marsh, Gilberts Eq. Rep. 154..... 35
Buck v. Beach, 206 U. S. 392,
5, 7, 8, 10, 11, 12, 15, 17, 18, 19, 20, 24, 40
Byron v. Byron, Cro. Eliz. 472..... 36
Callahan v. Woodbridge, 171 Mass. 595..... 19
Carr v. Lafevre, 27 Pa. St. 413..... 29
Chicago R. I. & P. Ry. v. Sturm, 174 U. S. 710.....7, 17
Commr. of Stamps v. Hope, L. R. Appeal Case (1891) 476..... 41
Dr. Leyfield's Case, 10 Co. 92 b..... 32
Edgcomb v. Dee, Vaughan, 101..... 35
Goodwin v. Robarts, L. R. 10 Ex. 337..... 30
Hodges v. Steward, Comb. 204..... 35
Hunter v. Board of Supervisors, 33 Ia. 376.....6, 13
Johnson Co. v. Hewitt, 76 Kans. 816..... 40
Liverpool Etc. Ins. Co. v. Orleans Assessors, 221 U. S. 346..... 18
Master v. Miller, 4 Term R. 320..... 33
Matter of Bronson, 150 N. Y. 1.....7, 9, 19, 20, 21, 22
" " Clinch, 180 N. Y. 300.....9, 23
" " Daly, 100 App. Div. (N. Y.) 373; 182 N. Y. 524.....9, 23
Matter of Fearing, 200 N. Y. 340.....7, 20, 40

PAGE

Matter of Horn, 39 Misc. (N. Y.) 133 ..... 8, 22
" " Houdayer, 150 N. Y. 37 ..... 7, 17
" " James, 144 N. Y. 6 ..... 8, 21
" " The Estate of Swift, 137 N. Y. 77 ..... 6, 16
" " Tiffany, 143 App. Div. (N. Y.) 327 4
" " " 202 N. Y. 550 4
" " Whiting, 150 N. Y. 27 40
Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395 ..... 5, 10
Miller v. United States, 11 Wall. 268 13
Milton's Case, Hardres, 485 34
Moore, Admx. v. Jordan, 36 Kans. 271 39
Morgan v. Mutual Benefit Life Ins. Co., 189 N. Y. 447 . 22
Pelham v. Rose, 9 Wall. 103 14
" v. Way, 15 Wall. 196 ..... 5, 14
People v. Trustees of Ogdensburgh, 48 N. Y. 390 ..... 8, 20
Phelps v. People, 72 N. Y. 334 21
Pinchon's Case, 9 Coke 88*b* 35
Regina v. Watts, 6 Cox. C. C. 304 ..... 8, 21
Rumball v. Ball, 10 Mod. 38 34
Selliger v. Kentucky, 213 U. S. 200 ..... 6, 8, 12, 15, 20, 24
State Tax on Foreign Held Bonds, 15 Wall. 300 40
Tryon Admr. v. United States, 32 Ct. of Claims R. 425 39
Union Transit Co. v. Kentucky, 199 U. S. 194 ..... 9, 22
Witherley v. Sarsfield, 1 Show. 125 35
Woodward v. Rowe, 2 Keble, 105 35
Wyman v. Halstead, 109 U. S. 654 ..... 6, 12
Yeomans v. Bradshaw, Carthew 373; Comb. 392 38

ADDITIONAL AUTHORITIES CITED.

American & English Enc. Of Law (2nd Ed.) Vol. 18, p. 515 21

PAGE

American & English Enc. Of Law (2nd Ed.) Vol. 18, p. 546 ---- 35
American & English Enc. Of Law (2nd Ed.) Vol. 25, p. 1034, 1035 ---- 35
6 Bacon's Abridgment 764 ---- 35
7 " " 236 ---- 32
7 " " 261 ---- 32
Blackstone, Book II. Chap. 30, p. 467 ---- 29
" " III, Chap. 9, p. 155 ---- 34
Cooley on Taxation (3rd Ed.) p. 3 ---- 9, 22
Daniel on Negotiable Instruments, Sec. 113 ---- 25
Fonblanque on Equity (2nd Ed.) p. 347 ---- 35
Hanson's Death Duties (4th Ed.), p. 239 ---- 6, 12
9 Harvard Law Review, 49 ---- 27
Holmes Common Law, p. 253 ---- 26
" " " p. 271 ---- 26
" " " p. 272 ---- 27
9 Law Quarterly Review, p. 70 ---- 31
Ogden on Negotiable Instruments, Sec. 8 ---- 31
2 Pollock & Maitland, History etc. (2nd Ed.) 205 ---- 32
" " " " " 210 ---- 33
" " " " " 223 ---- 27, 28
" " " " " 225 ---- 28, 29
" " " " " 227 ---- 29
Pollock, Principles of Contract (8th Ed.) p. 745 ---- 28
" " " " " p. 144 ---- 32
Rastell's Entries fol. 10*a* ---- 34
Toller (1st Ed.) p. 222, 223 ---- 35
Y. B. 4 Hen. VI. fol. 17, pl. 1 ---- 33
" " 27 " " " 9, " 1 ---- 32
" " 37 " " " 13, " 3 ---- 35

Statutes Cited.

PAGE

Act of Congress, July 17, 1862.....5, 13
3 & 4 Ann. Ch. 9, Sec. 3.....31, 34, 36
Connecticut Public Laws, 1903, Ch. 63 .....9, 23
" General Statutes, 1902, Sec. 2368..... 23
2 George II, Ch. 25, Sec. 3..... 21
Illinois, Hurd's Revised Statutes (1909) p. 1897, Sec. 366..... 23
New York Consolidated Laws, Ch. 22, sec. 39..... 22
" " " " " 40, " 1290..... 21
" " Laws of 1905, Ch. 368, Sec. 220 2
" " " " 1909, Ch. 27..... 22
" " Penal Laws, 1909, Ch. 88.....8, 21
3 & 4 William IV. Ch. 42, Sec. 3..... 35

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1913

No. 45

LAURA WHEELER AND CHARLES P. HOWLAND, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES C. TIFFANY, DECEASED,
Plaintiffs-in-Error,

against

WILLIAM SOHMER, COMPTROLLER OF THE STATE OF NEW YORK,
Defendant-in-Error.

IN ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF AND ARGUMENT
For Executors, Plaintiffs-in-Error.

This is a writ of error to the Surrogate's Court of the County of New York, to review a judgment entered on the twenty-third day of May, 1911, in accordance with a decision of the Court of Appeals (Record, p. 1). The question involved concerns the power of New York to levy an

inheritance tax upon debts due by residents of Illinois and Virginia to the estate of a resident of Connecticut. The tax was resisted on the ground that the persons both of debtors and creditor and the situs of the debt which New York sought to tax, were all beyond New York jurisdiction. The tax has been sustained upon the ground that promissory notes—constituting, as appellants believe, not the debt which has been taxed, but merely evidence of the debt—were within the territorial limits of New York at the time of the decedent's death.

Charles C. Tiffany was at the time of his death, on August 20, 1907, a resident of the village of Sharon in the state of Connecticut. (Affidavit of executor, Record pp. 7, 8.) At the time of his death he left real and personal property in the state of New York properly the subject of transfer or "inheritance" taxation, and a proceeding was instituted by the executors in the Surrogate's Court for the County of New York for the determination of the amount of the tax. (Petition of executor, Record, p. 6.)

The New York statute in force at the death of the decedent imposing transfer taxation upon the estates of non-resident decedents (Laws of 1905, chap. 368, Sec. 220) reads, so far as applicable to this estate,

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein * * * in the following cases:
> * * * * * *
> 2. When the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state at the time of his death" * * *.

The appraiser included in his appraisal under this statute the following promissory notes contained in a safe deposit box of the decedent at the Fifth Avenue Trust

Company in the City of New York, and fixed a tax thereon at the rate of five per cent. (Appraiser's report, Record, p. 23):

> (1) Four promissory notes made by George E. Pottinger, a resident of Chicago, Illinois, aggregating with interest $15,147.92, payable to Mr. Pottinger's order, and endorsed by him in blank. These notes were amply secured by respective deeds of trust covering real property in Chicago, executed to and held by an Illinois corporation and an individual resident of Illinois as trustees (Appraisers' report, Record, pp. 20, 21).

The tax on these notes amounted to $757.40.

> (2) Promissory notes of the Southern Railway Company, a Virginia corporation, unsecured, of the par value of $10,000. These notes were appraised at $9,127.22, and the life interest of certain beneficiaries in that amount, about 70 per cent. of their value or about $6,389, was assessed (Record, pp. 20, 22). (1)

The tax on that sum amounted to $319.45.

The executors objected before the appraiser that a transfer tax upon any of these notes deprived the executors and the beneficiaries of the estate of property without due process of law, and that the statute, construed to permit such taxation, was unconstitutional as being in conflict with the Fourteenth Article of Amendment to the Constitution of the United States.

The report of the appraiser assessing all of the notes and fixing the tax thereon was confirmed by *pro forma* order of the Surrogate entered December 13, 1910 (Record, p. 29); and under the local practice the executors appealed to the

---

(1) This figure results from applying to the value of these notes the ratio between the aggregate of assets taxable in New York and the aggregate of the deductions to be made from these same assets because of the exempt nature of certain other beneficiaries, (Appraiser's report, Record, pp. 20, 21, 22).

Surrogate on the ground that these notes were not within the statute, not being "property within the state," and also on the foregoing constitutional ground (Record, p. 5). The Surrogate confirmed his formal order (Record, p. 4). From the order of confirmation the executors appealed to the Appellate Division of the First Department, (Record, p. 3), which by a vote of three to two affirmed the decision of the Surrogate, (Record pp. 30–36; the opinions of the Appellate Division are reported in 143 App. Div., 327). The executors thereupon appealed to the Court of Appeals, which, writing no opinion (see 202 N. Y., 550) affirmed the decisions below (Record, p. 39), and upon the remittitur of that court was entered the order of the Surrogate's Court upon which this writ of error is taken (Record, p. 38).

The objection here relied upon by the appellants is that the statute so construed by the highest court of the state of New York deprives the executors and the beneficiaries of this estate of property without due process of law.

BRIEF.

The taxation by the state of New York of the full value of the debts represented by these promissory notes deprived the executors and beneficiaries of the estate of their property without due process of law, and was in contravention of the fourteenth article of amendment to the constitution of the United States.

1. *Jurisdiction of a state for purposes of transfer or inheritance taxation is limited to "property within the state," in the senses in which that phrase has been recognized.*

Metropolitan Life Insurance Co. v. New Orleans, 205 U. S., 395.

2. *(a) Promissory notes are only evidences of debt and not the debts themselves. Their situs, therefore, is not the situs of the debts; the situs of the debts is at the residence of one or the other of the parties to the relation.*

Buck v. Beach, 206 U. S., 392.

In that case the state of Indiana had attempted to levy annual taxation upon promissory notes made by residents of Ohio and secured upon Ohio real property in favor of a resident of New York, the notes for substantially the whole of a number of years being kept in Indiana and there taxed at their full value.

> "We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the state for taxation," (206 U. S., at p. 406).

In *Pelham v. Way*, 15 Wall., 196, this court held that an improper seizure and sale of a promissory note by a marshal under the confiscation act of 1862 gave the owner

of the note no cause of action against the marshal for more than nominal damages, the debt evidenced by the note being undisturbed by the confiscation and sale of the note and being still enforceable against the maker.

(b) The distinction between a debt and the evidence establishing it had been already recognized.

Wyman v. Halstead, 109 U. S., 654.
Attorney General v. Bouwens, 4 M. & W., 171, 191.
Hunter v. Board of Supervisors, 33 Iowa, 376.
Hanson's Death Duties (4th ed.), p. 239.

(c) A note is the representative of a debt as a warehouse receipt is the representative of personal property, but such a receipt cannot be taxed at the value of the goods on the theory that "in some way it represents them."

Selliger v. Kentucky, 213 U. S., 200.

3. *The special factors which warrant inheritance taxation upon choses in action belonging to the estates of non-resident decedents—control over the person of the debtor or over the means of enforcement of the obligation—do not exist here.*

Undoubtedly the field of inheritance taxation is broader than that of annual taxation. Tangible chattels may be taxed at the domicile of the owner where they come under the universal succession, or in the jurisdiction of their own situs.

Blackstone v. Miller, 188 U. S., 189 (semble).

In the case of choses in action the state of the owner's domicile levies one tax,

Matter of the Estate of Swift, 137 N. Y., 77,

while the state of the debtor's domicile levies a tax "not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor"—in other words,

because it grants a practical privilege by providing means for the collection of the debt.

> " What gives the debt validity ? Nothing but the fact that the law of the place where the debtor is will make him pay."
> *Blackstone v. Miller*, 188 U. S., 189.
>
> *Matter of Houdayer*, 150 N. Y., 37.

In this case the state of New York had no control over the persons of the debtors. That control was in the states of Illinois and Virginia respectively,

> *Buck v. Beach*, 206 U. S., 392, 407.
> *Chicago, R. I. & P. R'y v. Sturm*, 174 U. S., 710, 715,

and as neither the universal succession nor the control over the means of enforcement was granted or could be regulated by the state of New York, that state had no power to tax.

4. *The situs of bonds appears to determine the situs of the debts they symbolize, but bonds have always been sharply distinguished from promissory notes in that regard.*

For certain purposes bonds have a peculiar recognition in the common law, and for purposes of taxation, annual or inheritance, are often treated as having a situs dependent upon their physical whereabouts.

> *Matter of Bronson*, 150 N. Y., 1.
> *Matter of Fearing*, 200 N. Y., 340.

The case of *State Tax on Foreign Held Bonds*, 15 Wall., 300, is generally regarded as having established this doctrine. (See *Buck v. Beach*, 206 U. S., at p. 407).

But the rule does not embrace promissory notes.

> " The rule giving jurisdiction where the specialty may be found, has no application to a promissory note. Assuming such a rule the case here is not covered by it."
> *Buck v. Beach*, 206 U. S., 392, 403.

This distinction between bonds and promissory notes has a historical basis, (*Selliger v. Kentucky*, 213 U. S., 200, 204), and is discussed in an appendix to this brief.

A promissory note may be the subject of larceny (*People v. Trustees of Ogdensburgh*, 48 N. Y., 390, 397):

> "This consideration, however, is not near enough to the question involved to cause us to change our views of the law in regard to the taxation of property, and make that property within the State, which we think is clearly outside it."
>
> *Buck v. Beach*, 206 U. S., at p. 407.

Indeed, at common law a promissory note was not within the law of larceny, for larceny could not be committed of an instrument which had no value of its own and was only the evidence of a chose in action.

Regina v. Watts, 6 Cox, C. C., 304.

Larceny is no criterion, for certificates of stock, warehouse receipts and policies of insurance are unquestionably the subjects of larceny (1), yet none of them is the property whose situs determines the power of annual or of inheritance taxation.

Matter of James, 144 N. Y., 6.
Selliger v. Kentucky, 213 U. S., 200.
Matter of Horn, 39 Misc. (N. Y.), 133.

5. *Taxation rests upon protection as a correlative, and when no protection is either practically or theoretically possible,*

---

(1) The Penal Law of New York, Laws 1909, ch. 88, provides as follows:

"A person who, with intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: 1. Takes from the possession of the true owner * * * any * * * thing in action, evidence of debt or contract * * * steals such property, and is guilty of larceny."

taxation should not be laid: this is the broad basis for the rules limiting taxation.

Union Transit Co. v. Kentucky, 199 U. S., 194.
Matter of Bronson, 150 N. Y., 1.
Cooley on Taxation (3rd ed.), p. 3.

In this case Connecticut may tax, and indeed does so (2) because, as the state of the testator's domicile, it protects the universal succession.

The states of Illinois and Virginia may tax, because they protect the debts by affording recourse to their respective courts.

Matter of Daly, 100 App. Div. (N. Y.), 373; 182 N. Y., 524.
Matter of Clinch, 180 N. Y., 300.

But New York has protected nothing.

If such taxation is allowed, triple taxation on many kinds of choses in action is possible; in the case of a bill of exchange issued in multiplicate, the domiciliary states of the owner and of the primary obligor would be able to tax, and also each state within which one of the multiplicate bills happened to be found at the owner's death.

---

(2) "In all such estates any property within the jurisdiction of this state, and any interest therein, whether tangible or intangible, and whether belonging to parties in this state or not, which shall pass by will or by inheritance to the parent or parents, husband, wife, or lineal descendants, or legally adopted child of the deceased person, shall be liable to a tax of one-half of one per centum of its value for the use of the state; and any such estate or interest therein which shall so pass to collateral kindred, or to strangers to the blood, or to any corporation, voluntary association, or society, shall be liable to a tax of three per centum of its value for the use of the state." Public Laws of Connecticut, 1903, Chap. 63.

ARGUMENT.

Jurisdiction, as this court has often remarked, is as necessary for valid legislative as for valid judicial action. Taxation, then, always presents the question whether the subject of tax be within the jurisdiction of the taxing state. Inheritance taxation rests either upon the right of general succession or upon the transfer of particular property. In the case of a non-resident, it has a broader scope than annual taxation if there exist circumstances which give the state practical control over the singular transfer. If no such circumstances exist, then inheritance taxation is no more magical than annual taxation and rests upon the same basis, and a tax case determining the situs of a particular kind of property will be an authority for the right of taxation in either field.

As property of a non-resident without a state's jurisdiction "is beyond the State's taxing power, and the exaction of a tax upon it is in violation of the Fourteenth Amendment to the Constitution" (1), so also is it true that the power of the state to assess an inheritance tax upon the estate of a non-resident decedent is confined to property within the state.

Promissory notes are the evidence of a credit relation; the credits evidenced are property with situs in the states where the parties to the relation are domiciled, and not in the state where the paper evidences of the relation are kept.

In *Buck v. Beach*, 206 U. S., 392, promissory notes kept within the state of Indiana, the makers and owner of which were all residents of other states, were declared by this court not to be property within that state, and the as-

---

(1) *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S., 395, 399.

sessment of an annual tax under a statute which purported to tax them was held to be a taking of property without due process of law, "for the reason that as the assessment in this case was made upon property which was never within the jurisdiction of the State of Indiana the State had no power to tax it, and the enforcement of such a tax would be the taking of property without due process of law."

Mr. Justice PECKHAM after consideration of every phase of the question and an exhaustive review of the authorities expressed the decision of the court (p. 400):

> "The sole question then for this court is whether the mere presence of the notes in Indiana constituted the debts of which the notes were the written evidence, property within the jurisdiction of that State, so that such debts could be therein taxed.
> * * *
>
> "It was not the value of the paper as a tangible thing, on which these promises to pay the debts existing in Ohio were written, that was taxed by that State. The property really taxed was the debt itself, as each separate note was taxed at the full amount of the debt named therein or due thereon. And jurisdiction over these debts for the purpose of taxation was asserted and exercised solely by reason of the physical presence in Indiana of the notes themselves, although they were only written evidence of the existence of the debts which were in fact thereby taxed.
>
> "A distinction has been sometimes taken between bonds and other specialty debts belonging to the deceased, on the one hand, and simple contract debts on the other, for the purpose of probate jurisdiction, and the probate court, where the bonds are found, has been held to have jurisdiction to grant probate, while in the other class of debts (including promissory notes) jurisdiction has attached to the probate court where the debtor resided at the death of the creditor. Williams on Executors, 6th Am. from 7th English ed., bottom paging 288, 290, note (*h*); *Wyman v. Halstead, Adm'r.*, 109 U. S., 654. See, also, *Beers v. Shannon*, 73 N. Y., 292, 299; *Owen v. Miller*, 10 Ohio St., 136."
>
> "Under such rule, the debts here in question were

> not property within the State of Indiana, nor were the promissory notes themselves, which were only evidence of such debts. The rule giving jurisdiction where the specialty may be found has no application to a promissory note. Assuming such a rule, the case here is not covered by it."

The question in taxation Mr. Justice PECKHAM stated to be a new one (p. 406):

> "There are no cases in this court where an assessment such as the one before us has been involved. We have not had a case where neither the party assessed nor the debtor was a resident of or present in the State where the tax was imposed, and where no business was done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation. We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the state for taxation."

There was nothing novel in a sharp distinction between the debt itself and the evidence of it. In *Wyman v. Halstead*, 109 U. S., 654, approved in *Buck v. Beach*, and *Selliger v. Kentucky*, 213 U. S., 200, Mr. Justice GRAY said (p. 656):

> "The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable."

The discrimination between the debt which is a relation, and the evidence of it which is a piece of paper, is similarly emphasized in *Hanson's Death Duties* (4th Ed.), p. 239, and in *Attorney General v. Bouwens*, 4 M. & W., 171, 191.

In *Hunter v. Board of Supervisors*, 33 Iowa, 376, the court said (p. 378):

> "The money due on the notes is personal property, distinct from the property in the notes. The notes may be destroyed without impairing or destroying the debt. The notes are but the evidences of the debt, and as such are personal property. They are not, however, the debt, the thing the law requires to be assessed for taxation. While they are the best, they are not the only evidence of the debt. * * * The 'money' due is evidenced by promissory notes which are kept in Illinois merely for safekeeping; not for investment there under the management of an agent or anyone representing the owner. * * * Where would the property have been in case the contract had been an oral one? Would it be at the residence of the owner or at that of the witness if they were different? Most surely at that of the former, and that the evidence in this case is in writing makes no difference, since it is not the evidence nor the property *therein* that is required to be assessed, but the property in the money due, of which the notes are only the evidence. *Williamson v. Eastern Building & Loan Ass. of Syracuse, N. Y.*, 32 S. E. (S. Car.), 765; *Schripps v. Board of Review of Fulton County*, 183 Ill., 278; *Pinney v. McGregory*, 102 Mass., 186."

In an interesting litigation between private parties this court declined to identify a promissory note with the debt it represented.

An Act of Congress of July 17, 1862, authorized confiscation of the property of "rebels"; this act, said Mr. Justice STRONG in *Miller v. United States*, 11 Wall., 268, at page 296, contemplated that every kind of property could be seized effectually in some mode; and in particular that credits could be seized by garnisheeing the debtor.

Under this statute proceedings were instituted in Indiana to seize "one promissory note for the sum of $7,000, dated March 1st, 1862, and due four years after date, executed by Lewis Pelham" to Henry Pelham. Judgment of confiscation was entered and the marshal made return that

he had sold the note at auction to Lewis Pelham the maker for much less than the amount of the debt. In fact, however, the note was at all times in the possession of Henry Pelham, its owner the "rebel," evidently within the Confederate lines in the state of Kentucky.

After the conclusion of the war Henry Pelham brought an action against the marshal and the sureties on his bond for a false return to the writ of confiscation. In an intermediate stage of the litigation this court held in *Pelham v. Rose*, 9 Wall., 103, that the proceeding was directed against the note itself and that the marshal's return was a false one; such a return this court also held to be conclusive (*Brown v. Kennedy*, 15 Wall., 591).

The case coming again to this court after final judgment against the plaintiff (*Pelham v. Way*, 15 Wall., 196), it was here decided that although the courts must regard as conclusive the record showing confiscation of the note, nevertheless this did not amount to a confiscation of the debt. On that subject Mr. Justice STRONG said:

> "Undoubtedly a debt or a credit was capable of seizure under the confiscation acts, and of subsequent condemnation and sale. This we ruled in *Miller v. The United States*, and we then showed how property in action could be seized and brought within the jurisdiction of the court. But the question here is whether the debt was seized, or whether the subject of the seizure, and the consequent libel, was only an evidence of the debt, a thing capable of actual manipulation and delivery. That it was the latter an inspection of the record, and the decision of this court in *Pelham v. Rose*, sufficiently establish. The libel was against a promissory note, particularly describing it, and it was that, not the debt of which it was evidence, that was claimed to have been forfeited. The monition was against the promissory note, and nothing else. The marshal was commanded to attach the note and detain the same in his custody. It made no allusion to any right in action. The marshal's return was that he had arrested the property (described in the monition). The decree of the court was that the note should be exposed to sale,

> and the sale was of the property mentioned in the libel and in the decree. Plainly, a debt is distinguishable from any instrument of evidence of the debt. This was the view taken of the case in *Pelham v. Rose*. The language of this court then was as follows: 'In the case at bar a visible thing, capable of physical possession, is the subject of the libel. It is the promissory note of Pelham which constitutes the *res* against which the proceeding is instituted, and not a "credit," or debt, which the note is supposed by the defendant's counsel to represent.' For this reason it was held that to effect its seizure it was necessary for the marshal to take the note into his actual custody and control. That case determined that the arrest returned by the marshal was not a seizure of the debt, and consequently the debt was not confiscated."

A promissory note is not the debt, but only the evidence thereof. Lewis Pelham was not prejudiced by the marshal's seizing the promissory note; he could be prejudiced only by a seizure of the credit, and that could be effected only by notice to the maker of the note. Following Pelham's case, the executors of Dr. Tiffany's estate, needing no recourse to the courts of New York, might have permitted the taxing authorities to seize the promissory notes here involved without resultant loss to the estate—were it not for the fact that the taxing authorities were enabled to collect out of other property, present in the state and taxable, the tax alleged to be due on account of these notes.

As affording opportunity for taxation the credit relation is not unlike that of bailment, and as a promissory note is personal property so also is a warehouse receipt. *Buck v. Beach*, dealing with promissory notes is therefore paralleled by *Selliger v. Kentucky*, 213 U. S., 200, where Mr. Justice HOLMES said (p. 206):

> "We take it to be almost undisputed that if the warehouses were in Kentucky the State would not and could not tax both the whiskey and the receipts,

> even when issued in Kentucky form, and that it would recognize that the only taxable object was the whiskey. The relation of the paper to the goods is not changed by their being abroad, and the only question in the case is whether the paper can be treated as property equivalent in value to the goods, because in some way it represents them.
>
> * * * * * *
>
> "The tax is imposed on the theory that the receipts are the equivalent of the goods and are taxable on that footing, although the goods cannot be taxed. Assuming, as the Court of Appeals assumed, that the whiskey is exempt under the Constitution of the United States, we are of opinion that the protection of the Constitution extends to warehouse receipts locally present within the State."

An inheritance tax is laid upon the succession to property; it can be levied only by the state of the domicile, or by the state having the property within its jurisdiction and so controlling its transfer. "No one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a universitas and is taken into account again in the succession tax there." (*Blackstone v. Miller*, 188 U. S., 189, 204.)

In the case of the death of a creditor the state of his domicile levies one tax on account of its power to regulate the universal succession. (*Matter of Estate of Swift*, 137 N. Y., 77.)

The state of the domicile of the debtor levies a second tax on account of its power over the transfer of particular property through its control over the debtor.

> "But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. * * * What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay." (*Blackstone v. Miller*, 188 U. S., at p. 205.)

A corresponding test is the familiar one prescribed by Judge VANN, (*Matter of Houdayer*, 150 N. Y., 37), 'whether or not need exists for having recourse to the courts of the taxing state.'

Mr. Justice PECKHAM's remark upon this test is precisely available for us.

> "If payment of these notes had to be enforced it would not be to the courts of Indiana (where the notes were kept) that the owner would resort. He would have to go to Ohio (the domicile of the obligor) to find the debtor as well as the lands mortgaged as security for the payment of the notes." (*Buck v. Beach*, 206 U. S., 392, 407.)

"The idea of locality of things which may be said to be intangible," said Mr. Justice MCKENNA in an attachment case (*Chicago, R. I. & P. Ry. v. Sturm*, 174 U. S., 710, 715), "is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*."

It is true that possession of the evidences of debt like promissory notes offers certain conveniences in the way of prosecuting a claim. They provide simple and sufficient evidence of many of the essentials to recovery, and a bond of indemnity against prior negotiation is made unnecessary.

But these are only incidents: Judge VANN's test deals with indispensable recourse to the judicial system of the state. As evidential conveniences to recovery the notes delimit the jurisdiction for recourse no more than other classes of evidence—the testimony residing in the recollection of witnesses, the letters embodying a contract, etc.—and their presence affords no opportunity for " control of the ordinary means of enforcement "(2) of the debts they represent.

It has been contended in the New York courts by the State Comptroller that *Buck v. Beach* has no application; that an annual tax is levied on the basis of property situs alone, while an inheritance tax has a broader scope; Mr. Justice PECKHAM himself said in *Buck v. Beach* that cases on inheritance taxation are not controlling in annual taxation (apparently a short way of dismissing the cases sustaining a tax on the universal succession, or such cases as *Blackstone v. Miller*). The Comptroller contends that by converse reasoning *Buck v. Beach*, which is a case of annual taxation, is not controlling in *any* case of inheritance taxation. This argument illustrates the " undistributed middle "; if we distribute the middle premise, we shall reason thus.

I. Inheritance taxation has no greater scope than annual taxation except as it depends upon
(*a*) the regulation of the universal succession, or
(*b*) the control over the means of enforcement.

II. (*a*) This is not a case of universal succession; " We should not lose sight of the fact that the state, through the Transfer Tax Act, is exerting its taxing power only over that as to which it had jurisdiction for the purposes of taxation;

---

(2) *Liverpool, etc., Ins. Co. v. Orleans Assessors*, 221 U. S., 346, 354.

and we should not be confused, in that consideration, by statutes or decisions which bear upon the exercise of that power over residents within its territorial limits." (*Matter of Bronson*, 150 N. Y., 1, 6.)

(*b*) The whereabouts of the paper has no bearing upon the "practical fact" of "power over the person of the debtor."

III. The conclusion is that *Buck v. Beach* is precise authority in favor of the executors of this estate.

Clearly this was Judge KNOWLTON's view in *Callahan v. Woodbridge, 171* Mass., *595*, a case of a mortgage note situated in Massachusetts, the maker and owner of which were both domiciled in other states, when he said (p. 599):

> "Whether the note and mortgage were property within the jurisdiction of the Commonwealth is a different question (from that of bonds which were held to be taxable), which, upon the facts stated, it is not necessary to decide. We understand that the maker of the note, as well as the land covered by the mortgage, was not within the Commonwealth. Assuming that the note and mortgage were not property within this jurisdiction, the proceeds of them will be applicable to the payment of the debts and charges of administration, which, as we understand the facts, will be more than enough to absorb them."

Certain kinds of obligatory documents in commercial life and practice so absorb into themselves the debts they represent that their situs becomes that of the debts themselves.

Bank bills, for example, are distinguishable from notes of private individuals, and are taxable where kept because they circulate as money:

> "Although * * * circulating notes of banking institutions have sometimes been treated as property in the place where they were found, though removed from the domicile of the owner, *State Tax on Foreign-held Bonds*, 15 Wall., 300, 324, it has not

> been held in this court that simple contract debts, though evidenced by promissory notes, can under the facts herein stated be treated as property and taxed in the State where the notes may be found." (*Buck v. Beach*, 206 U. S., at p. 407).

It is held also that bonds are taxable where found. In the long series of transfer tax decisions of the New York Court of Appeals, from *Matter of Bronson*, 150 N. Y., 1, to *Matter of Fearing*, 200 N. Y., 340, the controlling factor in the case of bonds has been their physical presence within or without the state. The only excuse for the anomaly in the case of a bond is that " by a notion going back to very early law the obligation is, or originally was, inseparable from the paper or parchment which expressed it ". (*Selliger v. Kentucky*, 213 U. S., 200, 204). But there is no similarity for purposes of taxation between a bond and a note, and the criterion used in the case of bonds has never been applied to the negotiable instruments derived from mercantile law (3).

The fact that a promissory note may be the subject of larceny, that in that special connection the piece of paper may be said to have a situs, (*People v. Trustees of Ogdensburgh*, 48 N. Y., 390, at p. 397), and that this may give the owner recourse to the criminal courts of the state, has no effect upon the argument.

> " That would be in vindication of the general criminal justice of the State. This consideration, however, is not near enough to the question involved to cause us to change our views of the law in regard to the taxation of property, and make that property within the State, which we think is clearly outside it." (*Buck v. Beach*, 206 U. S., at p. 407).

---

(3) In order not to divert the argument at this point there is reserved for an appendix to this brief a condensed discussion of the " notion " as to bonds, and a comparison of the origin and development of promissory notes.

The history of the law leads, indeed, to just the opposite conclusion from that pressed upon Mr. Justice PECKHAM. At common law larceny could not be committed of a bill of exchange or promissory note, for that crime could not apply to an instrument which was only the evidence of a chose in action, and bills and notes were just that and no more. (*Regina v. Watts*, 6 Cox C. C., 304 [1854], Court of Criminal Appeal, per Lord CAMPBELL, C. J.). Although legislatures have now everywhere in aid of the public peace made bills of exchange, promissory notes, bank cheques, etc., the subjects of larceny, (2 George 2, Chap. XXV., Sec. 3 [1729]; Am. & Eng. Encyc. of Law, 2nd Ed., Vol. XVIII. p. 515), it is leaping all considerations to say that that brings the value of the whole credit into the state where the larceny occurred; the property in the credit is not gone, though the paper is.

Of various classes of instruments it is well established that they are the subject of larceny; and yet when the question of situs of the property of a non-resident decedent is involved, these instruments are the evidences of property ownership and are not themselves the property whose situs determines the power of taxation. A certificate of stock in a foreign corporation is, of course, a subject of larceny under the penal code of New York (4), yet that consideration has nothing to do with its taxability on transfer by death (*Matter of James*, 144 N. Y., 6; *Matter of Bronson*, 150 N. Y., 1).

---

(4) Penal Law, Laws 1909, Ch. 88, now Chap. 40 of the Consolidated Laws, Sec. 1290: "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: 1. Takes from the possession of the true owner * * * any * * * thing in action, evidence of debt or contract * * * steals such property, and is guilty of larceny" (See *Phelps v. People*, 72 N. Y., 334).

A policy of insurance is personal property under the Statutory Construction Law of New York (5), yet the interest of a non-resident decedent insured in a domestic company is not taxable by New York on the theory that the owner was so imprudent as to leave the policy here (*Matter of Horn*, 39 Misc., (N. Y.) 133). A man may be indicted for larceny of a deed, yet there is no such thing as larceny of realty, and the loss of the deed would not affect the title to the land.

There is a large way of looking at a constitutional question of this kind. Legitimate taxation of any character rests upon protection as a correlative.

> " The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property " (*Union Transit Co. v. Kentucky*, 199 U. S., 194, 202).
>
> " The justification of the demand " (for taxes) " is therefore found in the reciprocal duties of protection and support between the state and those who are subject to its authority, and the exclusive sovereignty and jurisdiction of the state over all persons and property within its limits for governmental purposes " (Cooley on Taxation, 3d Ed., p. 3 ; see *Matter of Bronson*, 150 N. Y., 1, 26).

The justification of the tax upon the universal succession is found in the protection which the state

---

(5) Laws of 1909, Chap. 27, now Chap. 22 of the Consolidated Laws, Sec. 39 : " The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership." (See *Morgan v. Mutual Benefit Life Ins. Co.*, 189 N. Y., 447).

of his domicile affords to the succession of all the decedent's personal property. Such protection in the case of Dr. Tiffany's estate is afforded by the state of Connecticut, and taxation upon that theory is levied upon his entire personal property by that state (Record, p. 13). (6)

The state where the obligor of the note is domiciled may assess a second tax because of the protection which the state affords to the credit and the recourse to its courts which it affords to the creditor (*Matter of Daly*, 100 App. Div. (N. Y.), 373; aff'd without opinion, 182 N. Y., 524; *Matter of Clinch*, 180 N. Y., 300; *Blackstone v. Miller*, 188 U. S., 189, 205). In this case Illinois affords protection to the credit represented by the Pottinger notes, and Virginia to the credit represented by the notes of the Southern Railway Company, and on this theory each state may levy a tax. (7)

---

(6) General Statutes of Connecticut 1902, Sec. 2368, as amended by Public Laws of Connecticut 1903, Chap. 63.

"In all such estates any property within the jurisdiction of this state, and any interest therein, whether tangible or intangible, and whether belonging to parties in this state or not, which shall pass by will or by inheritance to the parent or parents, husband, wife, or lineal descendants, or legally adopted child of the deceased person, shall be liable to a tax of one-half of one per centum of its value for the use of the state; and any such estate or interest therein which shall so pass to collateral kindred, or to strangers to the blood, or to any corporation, voluntary association, or society, shall be liable to a tax of three per centum of its value for the use of the state."

(7) Hurd's Revised Stat. of Illinois (1909), p. 1897, sec. 366. "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom, in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, in the following cases: * * * 2. When the transfer is by will or intestate laws of property within the State and the decedent was a non-resident of the State at the time of his death."

Taxation by the state of New York upon the transfer of the credits here involved offends against this sound theory of protection. The tax was not laid upon an assessment of the value of the pieces of paper as evidence, but was assessed on the whole value of the credits.

> "It was not the value of the paper as a tangible thing, on which these promises to pay the debts existing in Ohio were written, that was taxed by that state. The property really taxed was the debt itself, as each separate note was taxed at the full amount of the debt named therein or due thereon" *Buck v. Beach*, 206 U. S., at p. 402).

Yet, if New York grants a privilege of succession at all, it is only with respect to the paper as evidence. This is not overvaluation of property which the state has power to tax, but is taxation of property over which the state has no jurisdiction.

> "It would be a mere quibble to say that the receipts, as paper, had an infinitesimal value, that they acquired a substantial one, although much less than that of the whiskey, because of their practical use, and that this court is not concerned with a mere overvaluation. The tax is imposed on the theory that the receipts are the equivalents of the goods and are taxable on that footing, although the goods cannot be taxed." (*Selliger v. Kentucky*, 213 U. S., 200, 206.)

This phase of the matter offers surprising possibilities on the Comptroller's theory. The definition of the New York Statutory Construction Law of personal property includes also bills of lading, deeds, bills of sale and leases. If these documents, because of the Statutory Construction Law, or because of their being subjects of larceny, are to be regarded as containing in themselves the full value of the property they symbolize, then a Connecticut decedent could be taxed on the value of his homestead, if the deed were in New York; or on his leasehold interest in a Minnesota iron mine, if the lease were in New York; a Georgia planter

consigning cotton to Liverpool might be compelled to pay a tax to New York on the full value of the cotton if he died while the bills of lading were in the hands of his New York bankers ; if a Boston wool importer should die while his cargo of Australian wool was crossing the Indian ocean, his estate would have to pay taxes to New York if the invoice had reached his New York agent by fast mail. But suppose the invoice were here and the bill of lading in another state ; which state would collect an inheritance tax—or would both ?

Bills of exchange are usually drawn in duplicate or more parts (Daniel on Negotiable Instruments, Section 113), and of course, each is personal property and is the subject of larceny. Under the decision of the Court of Appeals, if the owner of an accepted duplicate bill should die after thoughtlessly allowing the bills to become separated, his estate might be compelled to pay taxes in four states on account of his ownership of one chose in action. Such hypothetical cases instance injustice no more than does the case at bar ; they serve only to bring us back to the sound principle upon which all taxation should rest.

Charles P. Howland,
For the Executors, Plaintiffs-in-Error.

APPENDIX.

The distinction made by Mr. Justice PECKHAM between the situs of the debt contained in a bond and the situs of the debt evidenced by a promissory note is a particular aspect of the fundamental difference between the two classes of instruments, a difference which finds expression in many ways. That this fundamental difference is due to historical causes, of which part at least are traceable to questions of procedure, does not alter the fact that the distinctions between bonds and notes are firmly embedded in the substantive law, for "whenever we trace a leading doctrine of substantive law far enough back, we are very likely to find some forgotten circumstance of procedure at its source (1)"

Difference of origin of course lies at the bottom, and out of difference of origin comes difference of development.

A charter was a writing (2). Writings were uncommon outside of the monasteries, and used chiefly on solemn occasions. It is a characteristic of the human mind to transfer attributes of occasions to things—to symbolize—and ceremonial writings derived a solemnity which men later came to attach to them without regard to the occasion of their use. Royal grants, charters of feoffment, were typical writings; as it was incredible that the will of the king or the lord could be gainsaid, so, if he had made a writing of his will, the document would naturally be considered to possess an absolute quality and to contain in itself all the rights it symbolized (Holmes on the Common Law, Lecture VII., passim). It appears to have been the occasion, not the seal, that at first made the writing a solemn one.

(1) Holmes on the Common Law, p. 253.
(2) Holmes on the Common Law, p. 271.

" Even in the chancery of our Norman kings the apposition of a seal had to struggle with older methods of perfecting a charter." (3)

The point is clearly proved by Professor Ames in 9 Harv. Law Review, 49 :

> " It has been often said that a seal imports a consideration, as if a consideration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view. It is now generally agreed that the specialty obligation, like the Roman *stipulatio*, owes its validity to the mere fact of its formal execution. The true nature of a specialty as a formal contract was clearly stated by Bracton :
>
> > ' Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniae non numeratae contra scripturam, quia scripsit se debere.' "

and authorities from the Year Books are cited.

Later more importance was attached to the seal.

> " When seals came into use they obviously made the evidence of the charter better, in so far as the seal was more difficult to forge than a stroke of the pen. Seals acquired such importance, that, for a time, a man was bound by his seal, although it was affixed without his consent. At last a seal came to be required, in order that a charter should have its ancient effect.
>
> " A covenant or contract under seal was no longer a promise well proved ; it was a promise of a distinct nature, for which a distinct form of action came to be provided." (4)

The effect of the seal derived a stimulus from the formal classification of the Roman law ; and though the classification itself never was adopted because its rules could not be reconciled with English practice, nevertheless the con-

---

(3) 2 Pollock & Maitland, History etc., 2nd Ed., p. 223.
(4) Holmes on the Common Law, p. 272.

tinental treatment of a sealed instrument as of peculiar character accentuated the English tendency.

> "The identification of Stipulation with formal writing, complete on Continent not later than the 9th century (see Brunner Röm. u. German Urkunde) was adopted by our medieval authors. In Glanvil we find that a man's seal is conclusive against him. * * * Fleta does say in so many words that a writing unsealed will not do. (Lib. 2, c. 60, Sec., 25: and see Bracton 99 *b*. 100 *a*.)" (5)

The older solemnities then began to lose force;

> "Men were beginning to look for a seal as an essential part of a charter. The unsealed 'books' of the Anglo-Saxon kings are called in question if they have not been confirmed by a seal. document. * * * But in England, as we have often seen, the law for the great became the law for all, and before the end of the thirteenth century the free and lawful man usually had a seal. It is commonly assumed that jurors will as a matter of course have seals. We must not think of the act of sealing as a mere formality; the impressed wax was treated as a valuable piece of evidence. If a man denied a charter that was produced against him and the witnesses named in it were dead, the seal on it would be compared with the seals on instruments the genuineness of which he admitted, and thus he might be convicted of a false plea." (6)

The sealed documents thus employed by a non-commercial people naturally at first related to land tenure. "Documents of a purely obligatory character were still rare," say Pollock and Maitland (p. 225)—"They seem to come hither with the Italian bankers." It was natural that traders so shrewd should bring to their transactions all the protection afforded by forms, and should invoke the factitious importance which had come to attach to a seal. Written obligations to pay money, required by the opera-

---

(5) Pollock, Principles of Contract (8th Ed.), 745.

(6) 2 Pollock & Maitland, History, etc. (2nd Ed.), p. 223.

tions of commerce, would be sealed at the instance of the creditor, just as they would contain all other possible protective elements (7).

Pollock and Maitland treat of the assignment or transfer of the bond: corporeal things could be transferred, and in their transfer passed also the rights embodied in them. But how could debts be transferred, the debtor never having promised to pay anyone except his creditors? This problem is solved by the inclusion in the instrument of the power to appoint an attorney or 'nuntius' who may exact the debt.

> "The attorney will have to produce the bond and also evidence, probably in the form of a 'power of attorney,' that he is the attorney of the original creditor. It seems probable that the process which in the end enables men to transfer mere personal rights has taken advantage, if we may so speak, of the appearance of the contract in a material form, the form of a document. That document, is it not itself the bond, the obligation? If so, a bond can be transferred." (8)

So much for the origin of the bond and its artificial position. As to the origin in England of bills of exchange, and of promissory notes which come along by way of later corollary, there appears to be a general agreement. Blackstone says of bills (Book II, chap. 30, p. 467):

> "A bill of exchange is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. * * * This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw

---

(7) 2 Pollock & Maitland, History, etc. (2nd. Ed.), p. 225.

(8) 2 Pollock & Maitland History, etc. (2nd Ed.), p. 227.

Carr v. Lafevre, 27 Pa. St., 413, shows how misty the origins have become.

> their effects out of France and England into those countries in which they had chosen to reside. But the invention of it was a little earlier; for the Jews were banished out of Guienne in 1287, and out of England in 1290; and in 1236 the use of paper credit was introduced into the Mogul empire in China."

So also Lord Chief Justice COCKBURN (9):

> "Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth, century. The use of them gradually found its way into France, and, still later and but slowly, into England."

Chief Justice TREBY one hundred years before Lord MANSFIELD had noted their development:

> "Bills of Exchange at first extended only to Merchants, Strangers, trading with *English* Merchants, and afterwards to Inland Bills between Merchants trading one with another here in *England*, and after that to all Traders and Dealers, and of late to all Persons trading or not." (10)

The hospitality of the law to these strangers was naturally slower than that of commerce:

> "We must understand that the law merchant was no part of the law of England for generations after it has followed trade, in a private capacity, to the British Islands. * * * The law merchant has gone through three stages in reaching the position it now holds in the legal tribunals. The first stage extended from the earliest times to the year 1606. Before this time the law merchant was considered as a special kind of law for a particular class of people (*i. e.*, merchants and traders at the great fairs, pie-powder courts, etc.) * * * The second stage of the law merchant extends from the year 1606 when Lord COKE took office as Chief Justice of England

---

(9) *Goodwin v. Robarts*, L. R., 10 Exchequer, 337, at p. 346).

(10) *Bromwich v. Lloyd*, 2 Lutw., fol. 1585 (8 Wm. 3).

> until the year 1756 in which Lord MANSFIELD became Chief Justice. The most noticeable effect upon the law merchant during this period was the manner of its administration. * * * This court (*i. e.* the King's Court of Common Law) did not administer it as law but as a custom *(Vanheath v. Turner (1622) 1 Winch., 24).* * * * The third stage began with the year 1756 * * * and extends to the present time. The thirty years which Lord MANSFIELD sat as Chief Justice was the period in which a system of mercantile law was fully established in the common law courts." (11)

The bond as a sealed instrument had established itself before the introduction of the flexible commercial instruments, which in their essential qualities are "wholly opposed to the spirit of early law. The alienability of rights *in personam* (to say nothing of proprietary rights) by simple endorsement or handing over of a document of title, the improvement of title by transfer, are very modern notions;" (12) and so we find that the Statute of 3 and 4 Ann c. 9, Sec. 3, to which promissory notes owe their negotiability, takes no account of instruments under seal. In short the bond is figurative, inelastic; the bill or note is Oriental, commercial and empirical; and we shall find the difference of origin responsible by a process of fossilization for the sharpest distinctions of substantive law in our modern books.

Perhaps the first distinction to note is that in the forms of action—always so important an element in the common law.

> "The remedy to recover money secured by deed was the action of debt. * * * This was a writ of right for chattels, an action, not to enforce a promise, but to get something conceived as already belonging to the plaintiff: it was called an action of property as late as the Restoration, a conception

---

(11) Ogden on Negotiable Instruments, Sec. 8, *et seq.*

(12) Jenks in 9 Law Quar. Rev. 70, p. 76.

which lingers even in some of Blackstone's language." (13)

> "The creditor is being 'deforced' of money just as the demandant who brings a writ of right is being 'deforced' of land. There may be trial by battle in the one case as in the other. (Though this disappeared before the 13th Century. See pp. 206 and 214). The bold crudity of archaic thought equates the repayment of an equivalent sum of money to the restitution of specific land or goods. To all appearances our ancestors could not conceive credit under any other form. The claimant of a debt asks for what is his own. * * *" (14)

Bacon says:

> "The party's seal, acknowledging the debt or duty, and confirming the contract, renders it a security of higher nature than those entered into without the solemnity of a seal. * * * And from its being a higher security, it is held, that for a breach of non-performance an action of debt only will lie. * * * A bond is a chose in action, which cannot be assigned over, so as to enable the assignee to sue in his own name; yet he has by the assignment such a title to the paper and wax that he may keep or cancel it." (15)

Debt being the form of the action and the bond its sole foundation, it was a matter of substance that profert be made of it in order that the court might scrutinize the manner of its execution (16), and Dr. Leyfield's case (17) mentions two earlier cases where a deed was lost by accident, but the judges would not let a deed be given in evidence which was not shown forth to the jury. "If one loses his obligation he loses his duty." (18) "When the action is upon a specialty, if the specialty is lost, the whole action is

---

(13) Pollock, Principles of Contract (8th Ed.), p. 144.

(14) 2 Pollock & Maitland, History, etc. (2nd Ed.), p. 205.

(15) 7 Bacon's Abr., 261.

(16) See 7 Bacon's Abr., 236.

(17) 10 Co., at 92b.

(18) per DANBY, J., in Y. B., 27 Hen. VI., 9, 1.

lost." (19) Later, however, as we see from the remarks of Mr. Justice BULLER in *Master v. Miller* (20) a greater liberality was introduced.

> "The difficulty which arose in the old cases depended very much on the technical forms of pleading applicable to deeds alone. The plaintiff made a *profert* of the deed under seal, which he still must do, unless he can allege a sufficient ground for excusing it; when that is done, the deed or the profert must agree with that stated in the declaration, or the plaintiff fails; but a *profert* of a deed without a seal will not support the allegation of a deed with a seal."

It is next to be noted that in the earliest times the action of debt had a limited scope, and was never applied to the 'negotiable instruments' of commerce.

> "Even in Edward I's time, whatever may have been the potential scope of the action of debt, it seems (if we may judge from the plea rolls, the Year Books and some manuscript collections of precedents that have come to us) to have been used but rarely save for five purposes; it was used namely, to obtain money lent, the price of goods sold, arrears of rent due upon a lease for years, money due from a surety, and a debt confessed by a sealed document." (21)

And though it survived as late as Blackstone's time, its use was not substantially expanded.

> "And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed; for, in case of such an action upon a simple contract, the plaintiff labors under two difficulties. First, the defendant has here the same advantage as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks

---

(19) per SHARDELOWE, J., with the approval of STONORE, C. J. and WILUGHBY, J., in Y. B., 4 Hen. VI., 17, 1. These citations are from Prof. Ames's article; he furnishes a large number of others.

(20) 4 Term R. 320 at p. 339.

(21) 2 Pollock & Maitland, History, etc. (2nd Ed.), p. 210.

> proper. Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all * * *." (22)

The earliest known form of pleading in an action on a negotiable instrument is a declaration by the indorsee of a bill of exchange against the drawer—though nothing was said of a bill of exchange or the custom of merchants in the declaration—in an 'action on the case to pay money' (Rastell's Entries, fol. 10*a*). Rastell has other declarations in assumpsit—payee against acceptor, and against drawer—which contain all the early fictions of factorage, at that time considered necessary in order to create the privity essential to support the action of assumpsit. All of these declarations are of the common law, unaided by reference to the custom of merchants.

It was a long time before the action of debt became open to holders of negotiable instruments. (23) Debt seems first to have been allowed against the maker of a promissory note in *Rumball v. Ball* (1712), 10 Mod., 38. *Rumball v. Ball* seems to have stood alone for many years. (24) The prevailing view of the early 18th century apparently was that as the statute of 3 and 4 Ann., c. 9, mentioned the recovery of damages, debt could not lie, because damages are never recoverable in an action of debt. At any rate, debt does not seem to have been allowed prior to this statute.

In Keble's time (25) and later in the time of Shower (26)

---

(22) Blackstone, Book III., Chap. 9, 155.

(23) See *Milton's case* (20 Car., II.), Hardres, 485, debt upon a bill of exchange accepted held to be the wrong form of action; see also *Brown v. London* (1670), 1 Vent., 132; 1 Lev., 298; 1 Mod., 285 (see p. 25).

(24) See, also, *Bishop v. Young* (1800), 2 B. & P., 78.

(25) 1620.

(26) 2 Wm. & M.

the action appears regularly to have been in case upon the custom. (27) Indeed, for some time even a general *indebitatus assumpsit* (28) would not lie on a bill of exchange, but the action had to be either a general *indebitatus assumpsit* for money had and received, or a special action on the case grounded on the custom. (29)

We may glance more rapidly at the remaining distinctions. Under the English statute of limitations an unsealed promissory note is outlawed in a shorter period than a sealed instrument such as a bond. (30) This is generally true under the statutes of the several states. (31)

In the administration of an estate a bond was paid before a promissory note. (32)

There are many other such distinctions; it is sufficient to mention that absence of consideration upon a sealed instrument was no defense at common law. (33) That it was a defense in an action upon a promissory note was debated in *Brown v. Marsh*, Gilbert's Equity Reports 154 (1720).

---

(27) *Woodward v. Rowe*, 2 Keble, 105; *Witherley v. Sarsfield*, 1 Show., 125.

(28) Said by VAUGHAN, C. J., in *Edgcomb v. Dee*, VAUGHAN, at p. 101, to be "much inferior and ignobler than the action of debt, which by the Register is an action of property."

(29) *Hodges v. Steward*, Comb., 204 (5 Wm. & M.).

(30) 3 and 4 William IV. c. 42, Sec. 3. See also 6 Bacon's Abridgement, 764.

(31) Am. & Eng. Encyclopaedia of Law and Procedure, Vol. 25, pp. 1034, 1035.

(32) *Pinchon's Case*, 9 Co. 88*b*. As to the general modern rule, see Am. & Eng. Encyclopaedia of Law and Procedure, Vol. 18, p. 546.

(33) Y. B., 37 Henry VI. 13-3. In this case the Chancellor committed the obligee to the Fleet for contempt for attempting to enforce his bond, but the common law judges who had advised the Chancellor to do this nevertheless felt constrained to give judgment in the obligee's favor. See also Fonbl. on Eq. (2nd. ed.) 347, n. f. Toller (1st ed.), 222, 223.

The question there involved was whether on the statute (3 and 4 Ann., Chap. 9), want of consideration on a promissory note could be given in evidence. Two judges thought not, though an injunction was granted.

> "The other two Judges thought there was a great Difference between a Note and a Bond, notwithstanding the Statute; for in the Case of a Bond, where there were Solemnities of contracting, viz. the Sealing and Delivery, if there was no Consideration, yet if there was no Fraud in obtaining the Bond, the Money was a Gift in Law to the Obligee; but the Note was no more than a Simple Contract, and notwithstanding the Statute says, that the Money shall be due and payable by Virtue of the Note, that only makes the Note itself Evidence of the Consideration, which it was not before the Statute, as appears by the Case of Clerk versus Martin and Pottet versus Pearson, 1 Salk, 129 (1702). But tho' the Note itself be Evidence of a Consideration, yet it is not conclusive Evidence, but turns the Proof upon the Defendant to shew that there was no Consideration given for such a Note; and so he can shew that it is still but a Simple Contract, and therefore but a *Nudum pactum unde non orito actio*, and of this Opinion was my *Lord Chancellor King*, and moved to rule it so at *Nisi prius*."

These remarks bring us very naturally to the difference between a bond and a promissory note in respect of situs, and therein the two instruments illustrate as before the historical differences of origin, the bond being a corporeal possession and having the situs of a chattel, the promissory note being merely evidence of a debt and the situs of a debt or credit relation depending upon the domicile of one or the other of the two parties involved therein.

In *Byron v. Byron*, Cro. Eliz., 472, the action was in debt, as administrator of Byron upon an obligation.

> "The debt is where the bond is, being upon a specialty; but debt upon a contract follows the person of the debtor; and this difference hath been oftentimes agreed."

The modern rule in the United States with regard to the situs of a bond for purposes of administration is the same as that in the time of Elizabeth.

In *Beers v. Shannon*, 73 N. Y., 292, the question was whether the Surrogate of Yates County had jurisdiction to admit to probate in that county a will whose maker was not a resident, the sole asserted ground for jurisdiction being that assets were in that county, consisting of a bond. The defendant in the action asserted that the Surrogate had no jurisdiction because the obligors on the bond did not reside in Yates County. The Court of Appeals held that the Surrogate had jurisdiction, and on page 299 made a distinction between bonds or "specialties" and contract indebtedness, as follows:

> (p. 299): "Clearly this bond and the right it gave was an asset of the testator. It is urged, however, that though an asset, it was not an asset anywhere but in the county where the obligors resided at the time of issuing the letters. *Kohler v. Knapp*, 1 Bradf., 241, is cited, in which it is said (at page 247): 'The rule is that debts constitute assets where the debtor resides'. If it be conceded that a debt upon simple contract follows the debtor, and has its *situs* where he has his abode, it is not so with a debt upon a bond, it being a specialty. 'The debt is where the bond is, being upon a specialty, but debt upon contract follows the person of the debtor; and this difference has been often agreed." *Per* ANDERSON, Ch. J.; *Byron v. Byron*, Cro. Eliz., 472. And so says Swinburn on Wills, p. 439 (folio), part 6, Sec. XI: 'And those debts are said to be *bona notabilia*, where the bonds or other specialties are, and not where the debtors inhabit. But in case the debts are only by contract, without specialty, they are then to be esteemed *bona notabilia* in the place where the debtor is.' And so it is of judgments; locality is given them by the *situs* of the court where they are entered, and not of the abode of the debtor. *Gold v. Strode*, Carthew, 148; *Yeomans v. Bradshaw*, *id.*, 373."

This distinction of situs is carried out in *Attorney General v. Bouwens*, 4 M. & W., 171, in a case of probate duty upon

the estate of a resident of Great Britain, who at the time of his death held bonds of foreign governments. It was argued for the defendant that the securities were but evidence of debt due to the estate from debtors out of the jurisdiction and must be deemed property in a foreign country, but the court applied the old rule as to bonds.

> (p. 191) "Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy, and which must therefore have been so situated as that he could have disposed of them in *pios usus*. As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdiction between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; *specialty debts where the instrument happens to be;* and simple contract debts, where the debtor resides at the time of testator's death; *and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title,* the debts due on these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be." (Italics ours.)

As to the line of cleavage thus drawn by Lord ABINGER, it has apparently always been the law that for purposes of administration the situs of a debt represented by a promissory note was at the domicile of the debtor. The following is the report of *Yeomans v. Bradshaw*, Carthew, 373, Comb. 392, (1722):

> "Upon a general demurrer to this plea, the Question was, Whether in the Case of a Bill of Exchange

(as this was) the Right of granting Administration doth belong to that Ordinary of the Place where the Bill was at the Time of the Death of the Intestate, as in the Case of a Bond or other Specialty; or whether 'tis no more than a debt upon simple Contract, and so follows the person of the debtor wherever he is.

Et Per Curiam: This debt upon a Bill of Exchange was not upon an Equality with a Debt upon Specialty; but is no more than a Debt upon simple Contract which follows the Person of the Debtor. The Administration granted by the Bishop of Durham to the Plaintiff is, therefore, void, as the Defendant, who was liable as Drawer of the Bill of Exchange, resided in London."

Here again the modern rule is the same as that of the older English law, and it is the general rule in this country that the situs of a promissory note as a piece of paper does not give jurisdiction for probate. In *Tryon, Adm'r, v. United States et al.*, 32 Court of Claims, 425 (1897), it was held that drafts of a New Mexico bank upon a New York bank, the drafts being deposited in a Washington bank, did not constitute assets in Washington, and a Washington court had not jurisdiction to appoint an administrator.

In *Moore, Administratrix, v. Jordan*, 36 Kans., 271, the testator was domiciled in Illinois; promissory notes were found in Colorado and an administrator appointed there over them. Her right to sue the Kansas obligor on these notes was denied, the court, in holding that there was no property in Colorado, saying (p. 275):

"So the rule has become established that debts such as are evidenced by promissory notes, are *bona notabilia* at the domicile of the debtor. * * * *The only conflict, however, is in regard to whether they are assets at the domicile of the intestate, or at the domicile of the debtor.* No authority to which our attention has been called holds that the mere fact that the evidences of debt happen to fall into the hands of an ancillary administrator appointed

> at a place other than the domicile of the intestate or of the debtor, vests the title to the debt in him."

We are brought now at last to the question of taxation. In that field it is held that a bond is annually taxable by the jurisdiction in which it has its physical situs. (34) For purposes of inheritance taxation a bond is similarly taxable. (35)

Promissory notes, on the contrary, are not annually taxable because of their physical situs within a particular jurisdiction, (*Buck v. Beach*, 206 U. S., 392), but the debts they represent are taxable annually at the domicile of the maker of the notes though the notes themselves be elsewhere.

In *Boyd v. Selma*, 96 Ala. 144, the owner of notes whose makers resided in another county, the notes being secured by land in the county where the makers lived and there held by an agent of the owner for collection and reinvestment, was held subject to an annual tax in the county of his residence on such note. The court said :

> "the thing taxed is *the debt*, a species of intangible property incapable of an actual *situs* independent of the owner. The notes and mortgages representing the debts due appellant may render the value of the debts more definite and stable, but they do not constitute the debts themselves, but are the mere evidence of such debts. They might be lost, stolen or destroyed, but the debts, the credits, would remain."

So in *Johnson Co. v. Hewitt*, 76 Kans., 816 (1907), the court said at p. 822 :

> "The doctrine that the debt evidenced by a note or secured by a mortgage is the substantial element of the owner's taxable property, that the note or mortgage is merely evidence, and that generally the

---

(34) *State Tax on Foreign Held Bonds*, 15 Wallace, 300.
(35) *Matter of Whiting*, 150 N. Y., 27 ;
Matter of Fearing (semble), 200 N. Y., 340, 344.

> debt and its evidence have no independent situs of their own, is now so strong in its own credit that it needs no sureties by way of citations of authority."

It would seem to follow that for transfer or inheritance taxation the debt represented by a promissory note is not taxable at the situs of the note, but at the domicile of the owner and at the domicile of the obligor. This last step appears to be directly deducible from *Commr. of Stamps v. Hope*, L. R. Appeal Cases (1891), 476. The significance of the case comes from the fact that it arose upon the asser tion of the Commissioner of Stamps for New South Wales that the decedent, who lived in Victoria, had assets in New South Wales at the time of his death, consisting of debts due by residents of New South Wales represented by promissory notes which the decedent had in Victoria. The question in the case was whether the debts were in substance represented by the notes or by a mortgage deed which was in Victoria, and the case therefore turns upon the question of the situs of the debts; so that the opinion, though general in its scope, bears with full directness upon our case. Lord FIELD, writing for the Privy Council, said:

> "Now, a debt *per se*, although a chattel and part of the personal estate, which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the Courts of this country, and is a well-settled rule governing all questions as to which Courts can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction

> within which he resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bona notabilia* where it was 'conspicuous,' *i. e.*, within the jurisdiction within which the specialty was found at the time of death."

Bearing in mind that we have found a promissory note to be classed among debts by simple contract as contrasted with bonds, we may say that this last case crystallizes the question under discussion. The criteria established by the history of English law appear to establish it for us that, so far as situs for taxation is concerned, a debt represented by a promissory note has "no other local existence than the personal residence of the debtor."

10

FILED
OCT 21 1913
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1913

No. 48

LAURA WHEELER AND CHARLES P. HOWLAND, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES C. TIFFANY, DECEASED,

Plaintiffs-in-error,

against

WILLIAM SOHMER, COMPTROLLER OF THE STATE OF NEW YORK,

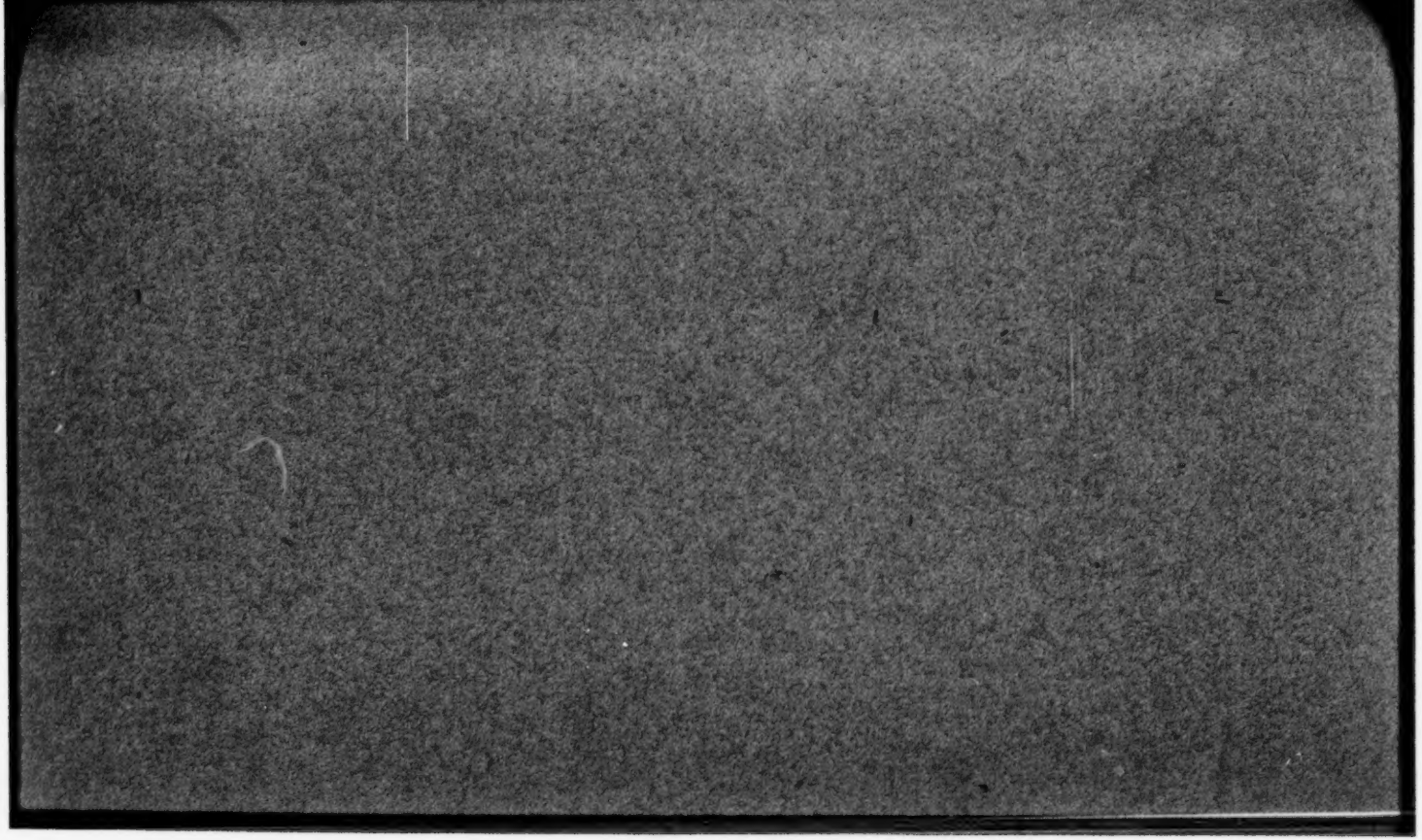
Defendant-in-error.

In Error to the Surrogate's Court of New York County, State of New York.

BRIEF

For Comptroller of the State of New York, Defendant-in-error.

WILLIAM LAW STOUT,
For Comptroller of the State of New York.



INDEX.

	PAGE
Statement of the case	1-6
Description of notes	2
Opinion of Mr. Justice McLaughlin writing opinion for prevailing Justices in the Appellate Division	3, 4, 5
Opinion of Mr. Justice Miller writing opinion for dissenting Justices in the Appellate Division	5
Questions presented	6

Brief.

Statutory Construction Law, now General Construction Law, Chap. 22 of Consolidated Laws, Sec. 39	7
Transfer Tax Law, Sections 220 and 242	7
Section 649 of the Code of Civil Procedure providing for attachment of notes	29
Section 2478 of the Code of Civil Procedure relating to founding of administration, in Surrogate's Court	30
Section 1918 of the Code of Civil Procedure providing for suit upon lost negotiable instruments	31

Citations.

Buck v. Beach, 206 U. S., 392	5, 6, 12, 13, 40, 41, 42
Tappan v. Merchants National Bank, 19 Wall., 490	27
Blackstone v. Miller, 188 U. S., 189	5, 12, 32
New Orleans v. Stempel, 175 U. S., 309	5, 11, 33, 34
Bristol v. Washington Co., 177 U. S., 133	11, 16, 49
Board of Assessors v. Comptoir National, 191 U. S., 388	18, 19
Pullman Palace Car Co. v. Penn., 141 U. S., 18-22	13
State Tax on Foreign Held Bonds, 15 Wall., 300	15
Coe v. Errol, 116 U. S., 517	16
State Railroad Tax Cases, 92 U. S., 575	16
Sellinger v. Kentucky, 213 U. S., 200	32, 42, 43
Gulf & Ship Island Railway Co. v. Hewes, 183 U. S., 66	47
Matter of Keeney, 222 U. S., 525	50

	PAGE
Campbell v. California, 200 U. S., 94	51
Heath-Milligan Co. v. Worst, 207 U. S., 338-354	52
Moffitt v. Kelly, 218 U. S., 400	39, 43, 44, 45
Eastern R. & L. Ass'n v. Ebaugh, 185 U. S., 114	39, 44
Union Transit Co. v. Kentucky, 199 U. S., 194	19, 20
Yazoo & Miss. Valley Railroad v. Adams, 181 U. S., 580	39, 40
Friedlander v. Texas, etc., Railway Co., 130 U. S., 416	23, 50
Southern Pacific Co. v. Kentucky, 222 U. S., 63	24
Wyman v. Halstead, 109 U. S., 654-656	30
Chicago, Rock Island, etc., Railway v. Strum, 174 U. S., 715	30
Cahen v. Brewster, 203 U. S., 552	36, 45
Knowlton v. Moore, 178 U. S., 41	36
United States v. Perkins, 163 U. S., 625	36, 37
Wallace v. Meyer, 38 Fed. Rep., 184	36, 40
Matter of Jones, 172 N. Y., 575	8, 9
Matter of Houdayer, 150 N. Y., 37	11
Matter of Whiting, 150 N. Y., 27	9, 10, 11
Matter of Morgan, 150 N. Y., 35-36	8
Matter of Bronson, 150 N. Y., 1	11
Matter of Fearing, 200 N. Y., 340	34, 35
Matter of Romaine, 127 N. Y., 80-88	8
Blackstone v. Miller, 171 N. Y., 682	11
People ex rel. Hoyt v. Commissioners of Taxes, 23 N. Y., 224-240	13, 26
Matter of Clinch, 180 N. Y., 300-303	26
People v. Board of Trustees, 18 N. Y., 390	32
People v. Smith, 88 N. Y., 576	32, 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 45.

LAURA WHEELER AND CHARLES P. HOWLAND, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES C. TIFFANY, DECEASED,
Plaintiffs-in-error,

vs.

WILLIAM SOHMER, COMPTROLLER OF THE STATE OF NEW YORK,
Defendant-in-error.

IN ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF

For the Comptroller of the State of New York, Defendant-in-Error.

Statement.

This is a writ of error to the Surrogate's Court of New York County, of the State of New York, but its real purpose is to review a decision of the Court of Appeals of the State of New York, affirming an order of the Appellate

Division of the First Department, which had affirmed an order of the Surrogate's Court of New York County, affirming the order assessing the tax entered upon the report of the transfer tax appraiser which had fixed the amount of the transfer tax upon the estate of the decedent Charles C. Tiffany.

The decedent died August 20, 1907, a resident of the State of Connecticut, but leaving in the State of New York certain real estate, and certain personal property actually located in the State of New York at his death, all of which has been appraised for taxation in the County of New York. Among this latter personal property, whose transfer has been held subject to the provisions of the Transfer Tax Law of the State of New York, were included the following promissory notes, located and held by decedent in a safe deposit box in his name at the Fifth Avenue Trust Company in the City of New York:

I. Promissory notes made by George B. Pottinger, a resident of Chicago, Illinois, aggregating with interest $15,147.92, payable to Mr. Pottinger's order and endorsed by him in blank. These notes were secured by respective deeds of trust covering real property in Chicago, executed to and held by an Illinois corporation and an individual resident of Illinois as trustees (fol. 11).

II. Promissory notes of the Southern Railway Company, a Virginia corporation, unsecured, of the par value of $10,000. The life interest in these notes, about 70 per cent. of their value, which amounts to $6,389, is assessed (fol. 13).

III. Promissory notes made by Edwin B. Sheldon, a resident of Delhi, New York, aggregating with interest $20,316.67, payable to Mr. Sheldon's own order and endorsed by him in blank. These notes were secured by a deed of trust covering real property in Chicago, executed to an individual resident of Illinois as trustee (fol. 13).

The successive appeals taken by the plaintiffs-in-error from each order of affirmance were from that portion of the *order assessing the tax* that included the foregoing promissory notes in the property *whose transfer* was held subject to the provisions of the Transfer Tax Law of the State of New York.

Plaintiffs-in-error contended, upon the successive appeals taken from each order of affirmance:

> I. That such promissory notes were not property within the State of New York; that each note constituted but evidence of the indebtedness expressed therein, evidencing only the relation of debtor and creditor, and that their *situs* at the death of the creditor was at his domicile, to wit, the State of Connecticut, and that only there may a transfer tax be imposed.
>
> II. That it was beyond the power of the Legislature of the State of New York to give to promissory notes the quality and attributes of tangible personal property and a *situs* where held or located, and that the order imposing a tax upon their transfer is in violation of both the State and Federal Constitutions.

The Appellate Division of the Supreme Court, First Department (143 App. Div., 327), by a divided court, and the Court of Appeals (201 N. Y., 550) unanimously upon the opinion of Mr. Justice McLAUGHLIN writing for the prevailing Justices in the Appellate Division, have both sustained the imposition of the tax upon the transfer of all the foregoing promissory notes.

Mr. Justice McLAUGHLIN, writing for the prevailing Justices, declared:

> "It cannot be doubted that the Legislature of this State in enacting the Transfer Tax Act considered promissory notes property, and intended to impose a tax upon their transfer. Personal property is defined in section 4 of the Statutory Con-

struction Law (Gen. Laws, chap. 1; Laws of 1892, chap. 677), which was re-enacted by section 39 of the General Construction Law (Consol. Laws, chap. 22; Laws of 1909, chap. 27), as follows:

'The term personal property includes chattels, moneys, things in action, and all written instruments themselves as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything except real estate, which may be the subject of ownership.'

The definition of personal property as thus given is applicable to cases under the Transfer Tax Act (*Matter of Jones*, 172 N. Y., 575). But notwithstanding the fact that the Legislature intended by the Transfer Tax Act to make promissory notes owned by a non-resident, if located within the State at the time of the owner's death, subject to a transfer tax, nevertheless it is claimed that it failed to accomplish that purpose for want of power.

In *Matter of Whiting* (150 N. Y., 27) it was decided that bonds of foreign as well as domestic corporations and certificates of stock of domestic corporations owned by a non-resident decedent and deposited by him in a safe deposit box in the State were, at the time of his death, were taxable under the Transfer Tax Act. Judge VANN, who delivered the opinion of the Court, said:

'The law already distinguishes "written instruments" from the rights or interests to which they relate, * * * and makes either taxable. * * * There is obvious propriety in subjecting *the instrument of transfer* to a transfer tax, *when it is left in this State for safe keeping.* It is subject to the *jurisdiction of our laws, and hence it is within the intent of the Transfer Tax Act.* When the design of the Legislature is to tax the transfer of everything that it has power to tax, there is no inconsistency in taxing one form if another is not available. Indeed, perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape *that can be owned or transferred.* Thus the Legislature intended, as I think, to repeal

> the maxim *mobilia personam sequunter* so far as it was an obstacle, and to leave it unchanged, so far as it was an aid to the imposition of a transfer tax *upon all property in any respect subject to the laws of this State.*"

Mr. Justice MILLER, who wrote the opinion for the dissenting Justices, based their decision upon the ground that this Court in *Buck v. Beach*, 206 U. S., 392, had established in all finality a rule that a promissory note is not in itself property, but evidence of an indebtedness, and *does not constitute property upon which a property tax may* be imposed, *and that therefore there can be no basis for the imposition of a tax upon its transfer*, declaring:

> "This Court in this department has passed on the question in favor of the right to impose the tax (*Matter of Wall*, 105 App. Div., 643). Irrespective of my individual opinion, I should be willing to follow that decision, but for what I regard to be a controlling decision of the United States Supreme Court (*Buck v. Beach*, 206 U. S., 392)."

The argument made in the Courts of the State of New York by the plaintiffs-in-error in support of *Buck v. Beach* as purporting to lay down the rule, as viewed by the dissenting Justices in the Appellate Division, is that the United States Supreme Court did not, in the decisions *cited to show its recognition of promissory notes as property where located, and there subject to direct taxation* (when not in *transitu* or held there temporarily), to wit: *Blackstone v. Miller*, 188 U. S., 189; *New Orleans v. Stempel*, 175 U. S., 309; *Board of Assessors v. Comptoir National*, 191 U. S. 388; justify the tax, sought to be held invalid, as a tax upon the notes as property, but recognized them only as evidence of the amount of money invested in the taxing State or the volume of business carried on in the taxing State, upon which the tax was in reality imposed, and that therefore the rule attributed to *Buck* v. *Beach* is established in all finality.

The questions which the plaintiffs-in-error present to this Court by their writ of error are:

I. Whether the State of New York may, by a declaratory statute, designate as tangible personal property, *when actually held or located within its domain,* promissory notes, distinguishing them from the rights or interests to which they relate, thereby modifying and abrogating their common law character and attribute as evidencing a debt (Statutory Construction Law, Laws of 1892, chap. 677, § 4; now General Construction Law, chap. 22 of Consolidated Laws, Sec. 39).

II. Whether the State of New York, under the provisions of its Transfer Tax Law, and under the statute construed by its courts to include promissory notes held and located within its domain, as tangible personal property subject to such Transfer Tax Law, may impose a transfer tax upon the transfer of the notes as herein described, owned by a non-resident, but held by him in a safe deposit box in his name in the State of New York, without depriving the plaintiffs-in-error of property within the inhibition of the United States Constitution.

III. Whether *Buck v. Beach,* 206 U. S., 392, has been correctly quoted by the plaintiffs-in-error as laying down a rule that promissory notes still retain without modification their common law attribute of being but evidences of debt, and that their *situs* generally for purposes of taxation is the domicile of the creditor.

BRIEF.

POINT I.

(A) Promissory notes, kept by a non-resident decedent in the State of New York, are properly assessed and taxed as personal property under the declaratory statutes of the State of New York.

Section 220 of the Transfer Tax Law provides, as far as applicable to this case, as follows:

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of $500 or over * * * in the following cases:
>
> 2. When the transfer is by will or intestacy law, of property within the State, and the decedent was a non-resident of the State at the time of his death."

Section 242 of the same law provides that:

> "The words 'estate' and 'property' as used in this article shall be taken to mean the property or interest of the testator * * * passing or transferred to those not herein specifically exempted * * * and shall include all property or interest therein, whether situated within or without this State."

The STATUTORY CONSTRUCTION LAW (Laws 1892, chap. 677, § 4, now GENERAL CONSTRUCTION LAW, Chap. 22 of Consolidated Laws, Sec. 39) defines personal property as follows:

> "The term '*personal property*' includes chattels, money, *things in action, and all written instruments themselves as distinguished from the rights or interests to which they relate, by which* any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is

created, acknowledged, *evidenced, transferred, discharged* or defeated, wholly or in part, *and everything, except real property, which may be the subject of ownership.*"

This definition of "personal property" has been repeatedly held applicable to cases under the Transfer Tax Law of the State of New York, in the following cases:

Matter of Jones, 172 N. Y., 575.
Matter of Whiting, 150 N. Y., 27.
Matter of Bronson, 150 N. Y., 1.
Matter of Romaine, 127 N. Y., 80-88.
Matter of Morgan, 150 N. Y., 35-36.

In *Matter of Jones, supra*, the question before the New York Court of Appeals involved the application of the Transfer Tax Law to shares of stock of a resident decedent in a joint stock association, publishers of the "New York Times," which shares evidenced real estate owned by the joint stock association, at a time when real estate was not included in the property whose transfer was held subject to the provisions of the Transfer Tax Law. It was urged that if the value of the real estate was included in the property whose aggregate value was the basis for valuation of these shares, it would accomplish a taxation, which the act did not contemplate. The tax placed upon the transfer of these shares was not upon the property whose value they represented, and it was held that by including the value of the real estate in the property represented by the shares, a property tax was not imposed under guise of a transfer tax.

Mr. Justice BARTLETT, writing the opinion of the Court of Appeals, declared:

> "The Statutory Construction Law (Laws of 1892, chap. 677, § 4), in defining personal property, says: 'The term "personal property" includes chattels, money, things in action, and all written in-

> struments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated wholly or in part, and everything except real property, which may be the subject of ownership.'
>
> This very exhaustive definition covers certificates of stock."

A different test must be applied to inheritance and succession tax cases, for the test of the right to impose a property tax is neither applicable nor proper. This is harmonious with the decision in *Buck v. Beach,* which held that inheritance tax cases were not applicable in deciding property tax cases, and by like reasoning, property tax cases are neither applicable nor controlling in inheritance tax cases, save as they take up the history of taxation generally and its underlying principles.

In *Matter of Jones* real estate was indirectly reached by the Transfer Tax Act; at least its valuation was included in the property of the joint stock association, the taxable value of whose shares was based upon the aggregate of its holdings, and it was immaterial whether the property itself was subject to a property tax, since the tax was imposed upon the transfer of the shares. Had the real estate been situate outside the State it could not have invalided a transfer tax upon their full value under these principles.

In *Matter of Whiting,* 150 N. Y., 27, which dealt with the right of that State to impose a transfer tax upon the testamentary succession of bonds of foreign and domestic corporations and certificates of stock of domestic corporations owned by a *non-resident* decedent, deposited by him in a safe deposit box in the State of New York, and held taxable under the Transfer Tax Law of that State, Mr. Justice VANN, writing the opinion for the Court, said:

> "The law clearly distinguishes 'written instruments themselves' from the 'rights or interests to which they relate' (L. 1892, ch. 677, §§ 1, 4, 32), and makes either taxable. There is obvious propriety in subjecting the instrument of transfer to a transfer tax when it is left in this State for safe keeping. It is subject to the jurisdiction of our laws, and hence it is within the intent of the Transfer Tax Act. When the design of the Legislature is to tax the transfer of everything that it has power to tax, there is no inconsistency in taxing one form if another is not available. Indeed, perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape that can be owned or transferred. Thus the Legislature intended, as I think, to repeal the maxim *mobilia personam sequunter*, so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this State."

In the same case, when before the Appellate Division of the New York Supreme Court (2 App. Div., 590), Mr. Justice PATTERSON, in construing the Statutory Construction Law so far as its definitions were applicable to the Transfer Tax Law of that State, said:

> "By section 4 of chapter 677 of the Laws of 1892 (the Statutory Construction Law), 'personal property is defined as including all written instruments themselves, as distinguished from the rights or interests to which they relate, by which * * * any debt or financial obligation is created, acknowledged, evidenced * * * wholly or in part.' If these statutory provisions and definitions are to be given operation according to their obvious meaning, but one conclusion can be drawn from them, namely, that bonds of corporations that are actually physically within the jurisdiction of this State constitute property in a legal sense, and are, therefore, subject to taxation by the State. *The effect of these enactments is to give to securities of the character of those involved here the same qualities of property that are recognized to exist in any other species*

of tangible personal property. A bond for the payment of money becomes something more than a mere evidence of an intangible indebtedness, and is placed by the statutes in the category of chattels generally."

In *Matter of Bronson*, 150 N. Y., 1, Mr. Justice VANN, in applying the definition of "personal property" as defined in the STATUTORY CONSTRUCTION LAW, *supra*, said:

> "It is difficult to conceive a definition more comprehensive than this, for it includes intangible property, as well as tangible, written instruments, as such, and everything, except real property, that is capable of being owned or transferred. *Thus the Legislature has declared its intention to subject to a transfer tax everything owned by a resident at the time of his death, and everything within this State owned by a non-resident at the time of his death, with certain exceptions not now important."*

(B) The maxim *mobilia personam sequuntur* is not an inflexible rule, but upon the contrary, may be modified or disregarded by the declaratory laws of the State in defining promissory notes as tangible personal property when held or located within its domain.

Its disregard, in so far as it is necessary to justify the imposition of a property and a transfer tax, has been upheld not only by the Courts of the State of New York, but also by the United States Supreme Court, in the following cases:

Savings Bk. v. Multonomah, 169 U. S., 421.
New Orleans v. Stempel, 175 U. S., 309.
Bristol v. Washington Co., 177 U. S., 133.
Eidman v. Martinez, 184 U. S., 578.
Blackstone v. Miller, 188 U. S., 189-206.
Matter of Whiting, 150 N. Y., 27.
Matter of Bronson, 150 N. Y., 1.
Matter of Houdayer, 150 N. Y., 37.
Blackstone v. Miller, 171 N. Y., 682.

The New York cases cited, dealt with the Transfer Tax, and it was necessary in each case to disregard the maxim to justify the imposition of its transfer tax. That the Legislature of that State had not only power to do so, but in doing so did not offend any of the State constitutional prohibitions, may be seen in each of the foregoing cases.

Thus, in *Matter of Whiting, supra*, answering the claim of the appellants that the maxim *mobilia personam sequuntur* was based upon fundamental principles of ownership of property, and that its disregard or modification in so far as was necessary to justify the imposition of a transfer tax in the State of New York upon bonds of foreign and domestic corporations, and certificates of stock of domestic corporations owned by a non-resident, but physically present in the State of New York, offended the prohibitions of the Constitution of the United States, because the Legislature had no power to disregard rights alleged to be based on the rule expressed in the maxim, Mr. Justice VANN declared:

> "The Legislature *possessed and exercised the power* to employ the maxim when necessary and to disregard it when necessary to employ that object * * *."

The United States Supreme Court in *Blackstone v. Miller* (188 U. S., 189) has expressed its opinion to the same effect, declaring:

> "The maxim *mobilia sequuntur personam* has no more truth in the one case than the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way."

In *Buck v. Beach*, 206 U. S., 392, Mr. Justice PECKHAM, writing the opinion of the Court, declared:

> "In regard to tangible property, the old rule was *mobilia personam sequunter,* by which personal property was supposed to follow the person of its owner, and to be subject to the law of the owner's domicile. For the purpose of taxation, it has long been held that personal property may be separated from its owner and he may be taxed on its account although it is not the place of his own domicile, and even if he is not a citizen or resident of the State which imposes the tax."

Citing

> *Pullman Palace Car Co. v. Pennsylvania,* 141 U. S., 18-22.
> *Tappan v. Merchants Natl. Bank,* 19 Wall., 490.
> *People ex rel. Hoyt v. Commrs. of Taxes,* 23 N. Y., 224-240.

Whatever modification of the maxim *mobilia personam sequunter* be necessary to justify taxation of the thing must be looked upon as a defiance of that much-quoted maxim.

The Supreme Court of the United States has never denied to the Courts of the State the right to deny the maxim, when necessary to justify taxation of the res, by declaring that the maxim was founded upon fundamental principles underlying the theory of the ownership and situs of personal property, which could not be modified.

Up to this point, we do not believe that the plaintiffs-in-error will disagree, but they now set up as a crucial test this argument:

> **That usage and custom cannot give the value of tangible personal property to a promissory note, because to do so would offend the fundamental principles which underlie their inception, and that the State of New York in its declaratory laws, by defining them as such when located or**

held within its domain, offends these fundamental principles, and attempts to create a new form of tangible personal property without power to do so.

Summarized, it amounts to a declaration that a promissory note was in its inception under the ancient law, and is, but evidence of an indebtedness; that fundamental principles of property are violated if this historic notion be not recognized; that the State of New York did not and could not get jurisdiction over *a thing* incapable of being recognized as such, according to these ancient ideas; and that defining a promissory note as such, as has been done by the State of New York, created *no object of property* within the State of New York upon which a property tax could be based, or upon whose transfer a transfer tax could be imposed.

POINT II.

The succession of the promissory notes held by the decedent in the State of New York at his death was properly assessed and taxed under the Transfer Tax Law of the State of New York. The Statutory Construction Law, now General Construction Law, as construed by the Courts, defining promissory notes as tangible personal property when held within the State of New York, and the Transfer Tax Law, of the State of New York imposing a transfer tax upon their succession within the State, do not offend any of the provisions of the Federal Constitution.

(A) The power of taxation of a sovereign State is over persons, property and business within its domain. It is within the sovereign

power of each State to designate and classify all objects of property within its domain which shall be subject to taxation. It is not necessary that both owner and thing assessed be within the jurisdiction of the State.

These basic principles which underlie the sovereign power of the State to tax are universally recognized.

The breadth and extent of this power to tax is practically unlimited, and the State may reach every object of property and every act of business transacted *within its jurisdiction* when necessary for either purposes of revenue or regulation.

In "State Tax on Foreign Held Bonds," 15 Wall., 300, Mr. Justice FIELD, going over the history of taxation and its underlying principles, declared:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of the subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural conditions, in its manufactured form, and in its various transmutations. And the amount of taxation may be determined by the value of the property, its use, or its capacity or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufacture, and in transportation. Unless restrained by provisions of the Federal Constitution, *the power of the State as to the mode, form and extent of taxation is unlimited* where the subjects to which it applies are within her jurisdiction."

Nor is the power of the State to tax the *thing within its domain and jurisdiction* disputed or even limited. In the case of *Coe v. Errol,* 116 U. S., 517, Mr. Justice BRADLEY declared:

> "We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction * * *. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action does not in the least affect the right of the State in which the property is situated to tax it also."

Again, in the much cited "State Railroad Tax Cases," 92 U. S., 575, Mr. Justice MILLER said:

> "Another objection to the system of taxation by the State is that the rolling stock, capital stock, and franchise are personal property, and that this with all other personal property has a local *situs* at the principal place of business of the corporation and can be taxed by no other county, city or town but the one where it is situated."
>
> "This objection is based upon the general rule of law that personal property, as to its *situs,* follows the domicile of the owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it, and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. *Green v. Van Buskirk,* 5 Wall., 312. Like all other laws of a State, it is, *therefore, subject to legislative repeal, modification or limitation."*

To same effect are:

Dewey v. Des Moines, 173 U. S., 193-204.
Bristol v. Washington Co., 177 U. S., 133-141.

Louisville & I. Ferry Co. v. Kentucky, 188 U. S., 385-396.
Pullman v. Commonwealth, 141 U. S., 18.
Tappan v. Merchants Natl. Bk., 19 Wall., 490.

(B) It is within the power of a State to create a situs for property tangible or intangible, in so far as it is able to obtain jurisdiction and dominion over the object of transfer as a basis for the imposition of a transfer or inheritance tax.

There can be no criticism that a tax upon tangible personal property within the domain of the taxing State, although the owner thereof be a non-resident, offends the inhibitions of the Federal Constitution.

The essential thing, in a property tax, is whether the *thing purported to be reached by the tax laws* lies within the jurisdiction of the State. *This determination of situs* requires a determination by the Courts of the taxing State, first, of the facts surrounding the location of the property, the conditions under which it was there held, whether it was in *transitu* or held there temporarily or by accident; second, the construction and application of the declaratory laws of the State, construed and applied according to the jurisprudence of the State. A determination thereof by the highest Court of the State of New York represents *final judgment of that State as to all matters of fact essential to be found according to the jurisprudence of the State.*

(C) There is no provision in the Federal Constitution forbidding a State to give to the promissory note the attribute of tangible personal property, or forbidding the State to impose either a direct tax thereon when actually located in the State, or to impose a transfer tax upon the transfer effected by the

death of the owner, whether resident or non-resident.

In *Board of Assessors v. Comptoir National, supra,* Mr. Justice DAY declared:

> "It may be taken as a general rule of the law of taxation of personal property that such property can only be taxed at the residence of the owner, or at such place as it has acquired a *situs,* which will subject it to the taxing power of the State where found. In its application to tangible property, there is little difficulty in applying this principle. The difficulty arises in determining whether a credit or chose in action has acquired a local *situs* in contemplation of law at a place other than the domicile of the owner in such sense as will permit the State to tax it in the place of its localization. *The cases are numerous, both State and Federal, which recognize the right of the State, in view of the protection and remedial rights which its laws give to the owner of intangible property, such as notes and bills, to require from such property a contribution to the funds of the State, to be collected by taxation,* for the purpose of maintaining and enforcing the laws which give force and effect to such obligations. * * * Still later the subject was under consideration in *Blackstone v. Miller,* 188 U. S., 189, in which it was held that a deposit by a citizen of Illinois in a trust company in New York was within the taxing power of the latter State, even though the depositor intended to withdraw the money for further investment, and although the deposit had been subjected to taxation in Illinois as a part of an estate to which it belonged."

And later, referring to the decisions of this Court in *New Orleans v. Stempel, Bristol v. Washington County,* and *Blackstone v. Miller,* said:

> "From these cases it may be taken that there is no inhibition in the Federal Constitution against the right of the State to tax property in the shape

> of credits when the same are evidenced by *notes or obligations* held within the State, in the hands of an agent of the owner for purpose of collection or renewal, with a view to new loans and carrying on such transactions as a permanent business. The maxim *mobilia personam sequunter* which was applied in the Court below as forbidding taxation of the checks in the hands of the agent in New Orleans, has been frequently held to be but a fiction of law, having its origin in considerations of general convenience and public policy, and NOT TO BE APPLIED *to limit or control the right of the State to tax property within its jurisdiction,* it being intended to permit the owner to deal with his personalty according to the law of his domicile, and to make testamentary disposition of it according to the law where he is rather than that of the *situs* of the property. It was intended for convenience, and not to be controlling where justice did not demand it."

And again at page 405:

> "We find nothing in the requirements of the Federal Constitution or the Statute of the State of Louisiana as construed by its Supreme Court, which should exempt such property from bearing its burden of taxation for the public benefit."

Although the question of the promissory note did not directly come up in the preceding case, *the protection given to the owner of a promissory note, in the various statutes of the State of New York, might equally have been the subject of the preceding declaration.*

(D) If justification for Legislation be found, a statute will not be dissected to show how little or how much benefit has accrued or may accrue to the taxpayer.

Upon this latter point, Mr. Justice BROWN in *Union Transit Co. v. Kentucky, supra,* said:

> "In other words a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit."

(E) Justification for the classification of promissory notes in the Statutory Construction Law, now General Construction Law, of the State of New York, as tangible personal property when held within the State of New York.

On page 22 of their argument, plaintiffs-in-error point out that the only justification for taxation of property of a non-resident is the protection and security given to it by the taxing State, but that as to the promissory note, it cannot be said to receive the protection and security essential as justification for its taxation, for the reason that in one case the debtor was a non-resident and in another the debtor and security were without the domain of the State, and that therefore the obligations represented by the notes cannot be enforced in the State of New York.

Primary recourse to the security referred to, is not obligatory, and it cannot be said that the decedent did not have open to him, nor those who succeed thereto, may not yet have recourse to the security, protection and relief which the statutes and Courts of the State of New York offered and still offer to the holders of these notes without discrimination.

In *Union Transit Co. v. Kentucky*, 199 U. S., 194, Mr. Justice BROWN said:

> "The power of taxation is exercised upon the assumption of an equivalent rendered *in the protection of property and person of the taxpayer.*"

Can it be said that the State of New York has not given to the owner of the notes certain rights, privileges and

remedies available equally to him as to its residents? Upon the contrary, keeping these notes in its domain indicates that he deliberately chose a place for their safe keeping, having at all times the remedies open to him in replevin or attachment if capable of being found in this State; and in addition the recognition of his property rights in a promissory note in the Penal Law, Laws of 1909, Chap. 88, now Chap. 40 of the Consolidated Laws, Section 1290; defining its unlawful appropriation as larceny.

(F) The fundamental differences between a negotiable and a non-negotiable promissory note, and between these notes and ordinary choses in action, have justified the recognition of a promissory note as tangible personal property when held or located within the State of New York.

The differences between bonds and promissory notes may be traced historically to the conditions which existed during the primitive days of these instruments, when formalities of execution were essentials of the substantive as well as the remedial laws. And while these differences were *then* viewed as evidencing fundamental distinctions, the presence or absence of certain solemn ceremonials giving or not giving validity to the bond, yet the general use to-day of promissory notes, as limited circulating mediums and objects of general investment, requires their recognition as tangible personal property wherever held or located.

The differences between a negotiable and a non-negotiable promissory note, which are asserted to be fundamental, are as marked to-day as in the days of their inception and recognition. But when we look upon the constructions which the several Courts have placed upon the liabilities of endorsers on one class as against endorsers on the other, and the theory upon which a transfer of each class is based, we can see that the differences be-

tween each note, and between the negotiable promissory note and an ordinary chose in action, indicate a radical development of the features first attributed to them, and a necessity that they be construed in the light of to-day's requirements.

It requires but a further abrogation of the principles of *situs* (admitting only for the purposes of the argument that under the archaic conditions attending their inception they were recognized as but evidences of debt, and that the Courts have been reluctant to recognize them otherwise), to justify their conception as tangible personal property where held.

To deny to the State the right to modify the substantive law in so far as it may give an attribute of property to the promissory note, would be to take from the State one of the sovereign attributes, to wit: the right of defining property within its domain and jurisdiction, of determining its tenure, and the conditions and limitations which it may deem proper for its creation, inception, transfer and satisfaction.

The States of New York and Massachusetts have construed the Statute of Anne as giving certain of the qualities of the negotiable note to the non-negotiable note, to wit: that the non-negotiable note, if transferred before maturity, carries with it a presumption of consideration. To that extent, it is, in these States, distinguished from an ordinary chose in action which requires proof of consideration, and gains an important element existing in the negotiable note, to wit: the presumption of consideration. This latter feature is an important qualification toward making a negotiable note a circulating medium. The State of Connecticut, where the decedent resided at his death, on the contrary, has taken the view that the Statute of Anne was intended to apply only to negotiable notes, and has construed the non-negotiable note as an ordinary chose in action, and a consideration therefor must be shown. In the State of New York, there can be no objection to the inclusion of the non-negotiable as well as the negotiable

note in the Statutory Construction Law, as construed by its Courts.

The view taken by the State of Connecticut is commented upon by Prof. Norton in Bills on Notes, 3rd Ed., 7, as being more consistent with the original intention of the statute.

> "This is more consistent with the original intention of the statute. For one of the most marked distinctions between the custom of merchants and the rules of the common law was in reference to the assignment of contract rights. The custom of merchants aimed to shut out equities from following. According to that custom, want of consideration was no defense to an instrument in the hands of a *bona fide* holder, and hence, by way of corollary, came the doctrine that an expression of consideration in the instrument was wholly unnecessary. *But this was confined to negotiable instruments; it did not include non-negotiable ones.*"

Bills and notes may have been viewed with disfavor by the Courts during the early law, but to look upon them limited by the primitive conditions surrounding their inception and development, would be to render them inelastic as a great and almost universal commercial medium, and contrary to the spirit of this age.

The promissory note is an object of almost general investment as the bond. The distinctions of *situs* urged upon this Court are based upon the distinctions which arose during their inception, and the cases cited in the appendix of the brief of plaintiffs-in-error indicate the slow growth and struggle for their recognition as property with a *situs* where located, rather than defining a fixed barrier for all times.

In *Friedlander v. Texas etc., R'way Co.*, 130 U. S., 416, Mr. Chief Justice WHITE, contrasting bills of exchange and promissory notes with bills of lading, said:

> "Bills of exchange and promissory notes are representatives of money, circulating in the commer-

cial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part."

THE FUNDAMENTAL PURPOSE OF NEGOTIABILITY IS TO ENDOW THEM WITH ALL THE FACILITIES NECESSARY FOR A LIMITED COMMERCIAL MEDIUM.

Norton on Bills and Notes.
Parsons on Negotiable Instruments.
Russell v. Whipple, 2 Cow., N. Y., 536.
Goodwin v. Roberts, L. R. 10 Exch., 337.

That the statute of the State of New York violates no property right of the plaintiffs-in-error may be seen from the terms of the statute *which gives this new attribute of property only to such promissory notes as are held or kept within its domain.* A question might arise if the State of New York insisted upon giving this new attribute to promissory notes generally in construing rights *which arose in another jurisdiction.*

There is no Federal inhibition against the State giving a *situs* to promissory notes for purpose of its own.

In *Southern Pacific Co. v. Kentucky,* 222 U. S., 63, Mr. Justice LURTON, commenting upon the maxim *mobilia personam sequunter,* in so far as it did or did not establish the *situs* of personal property generally for purposes of taxation, said:

> "The ancient maxim which assigns to tangibles as well as intangibles the *situs* of property for purposes of taxation, has its foundation in the protection which the owner receives from the government of his residence, and the exception to the principle is based upon the theory that *if the owner by his own act* gives to such property a permanent location elsewhere, the *situs* of the domicile must yield to the actual *situs* and the *resulting dominion of another government.*"

POINT III.

(A) The State of New York in its sovereign power over all property within its domain, may declare by appropriate legislation that promissory notes held and located within its domain shall be recognized as tangible personal property; such legislation does not offend any of the rights of the plaintiffs-in-error under the Constitution of the United States.

To deny to the sovereign State the right to declare by appropriate legislation that a promissory note, if kept within its domain, shall be deemed tangible personal property, and subject to all laws of the State as such, would be to deny to the sovereign State the right to vary or modify either the common law or earlier statutes in so far as they may have affected property or classified the various tenures of property within its domain, for purposes of taxation or otherwise.

The contention of the plaintiffs-in-error that the Statutory Construction Law is not only inapplicable, but that it was beyond the power of the Legislature of the State to create a situs for promissory notes, by virtue of their physical presence in its domain, and that to give to them a *situs* and value as tangible personal property in disregard of the domicile of the payee or creditor has deprived them of property in contravention of their rights under the Constitution of the United States, Article I, Section 10 thereof, and Article XIV, Section 2 thereof, *can only be supported by declaring:*

I. That a sovereign State cannot give to a promissory note, actually located within its domain, the character and attributes of tangible personal property.

II. That neither usage or custom may give to the promissory note any attributes of property

other than the common law notion that it was a chose in action, evidencing only the relation of debtor and creditor, whose *situs* is, for purposes of taxation, the domicile of the creditor.

III. That the Statutory Construction Act, so far as it purports to do so, is without force and effect.

In *Hoyt v. Commissioners of Taxes*, 23 N. Y., Chief Justice COMSTOCK, referring to attachment of property of a non-resident, the recovery of a bankrupt's property, and probate proceedings upon property of a non-resident, and to the extent that the maxim *mobilia personam sequunter* had been abrogated and disregarded as justification for such proceedings, said:

> "Yet we do in certain cases administer upon goods and chattels of a foreign decedent; we refuse to give up the effects of a bankrupt until creditors have been paid; and we have laws of attachment against the effects of non-resident debtors. These and other illustrations which might be mentioned demonstrate that the fiction or maxim '*mobilia personam sequunter*' is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require."

To the same effect, *In Matter of Clinch*, 180 N. Y., 300-303, Mr. Justice HAIGHT declared:

> "It said that the doctrine that the *situs* of personal property was the domicile of the owner was merely a fiction which must yield to facts; that it was the law of the place of the debtor which gave the debt validity and forced him to pay, and that it was within the constitutional power of the State where the debtor resided to tax the obligation from him to a non-resident, *excepting, however, the case of bonds and negotiable instruments which are considered to be not merely evidence of the debt, but inseparable from the debt itself.*"

The State of New York, having the power to create a *situs* for promissory notes actually held within its domain, has not impaired the constitutional rights of the plaintiffs-in-error by so declaring, for it must be held that the decedent, by enjoying the security and protection of the laws of the State of New York, *by his own act,* brought these notes, one and all, within the operation of the statute. We submit that they would have been subject to a property tax thereon under the Statutory Construction Act, but, as objects of the Transfer Tax Law, are not subject to the tests and limitations applicable under a property tax.

In *Tappan v. Merchants Natl. Bank,* 19 Wall., 490, Mr. Chief Justice WAITE said:

> "Personal property, *in the absence of any statute to the contrary,* follows the person of the owner, and has its *situs* at his domicile. But for the purpose of taxation, it may be separated from him and he may be taxed on its account at the place where it is actually located. These are familiar principles and have often been acted upon in this Court." (The italics are ours.)

A STATUTE, HOWEVER, HAS INDICATED TO THE CONTRARY. There is thus statutory evidence of intention otherwise, presenting nothing in conflict with the rule *"that if there is no provision in the statute evidencing an intention to give property a situs separate from that of its owner, the tax will be held to apply only to cases where the persons and property have a recognized situs within the domain of the taxing State."*

Moore v. Ruckgaber, 184 U. S., 593.
Eidman v. Martinez, 184 U. S., 578.

(B) The declaratory law of the State of New York defining promissory notes *when found within the State* as tangible personal

property, permitting their attachment irrespective of the domicile of the maker or debtor, permitting them to be replevied if found within the State, permitting levy upon and sale under an execution, indicates that the Legislature of the State of New York has abrogated the common law notion that a promissory note was but evidence of an indebtedness, and has given to it the character of tangible personal property.

The Statutory Construction Law has met an insistent commercial demand of having the promissory note recognized as tangible personal property, and putting it on the same footing as other tangible personal property, which is subject to the taxing power of the State.

Such recognition by the Legislature of the State of New York may be looked upon *as a declaratory act of the same value as the Statute of Anne which conferred negotiability upon it in earlier years.*

This latter statute conferred upon the *possessor* property rights which were actionable in themselves with the possession of the notes.

> *Clerks v. Martin,* 2 Ld. Ray., 757.
> *Bullier v. Crips,* 6 Mod., 29.
> *Mandeville v. Riddle,* 1 Cranch., 29.
> *Bromwich v. Lloyd,* 2 Lutw., 503.

The Statute of Anne was enacted to meet the rule which had then been enunciated by Chief Justice Lord HOLT, who refused to allow a plea that a promissory note and bills of exchange were negotiable, as follows:

> "To allow such a rule to carry any lien (obligation) with it were to turn a piece of paper which in law is but evidence of a parol agreement into a specialty."

Immediately after the enactment of this statute, a payee could maintain an action within the statute against the

maker, BY WHICH WAS MEANT THAT A PAYEE COULD BRING AN ACTION UPON THE NOTE AS SUCH, INSTEAD OF DECLARING UPON THE CONSIDERATION OR TRANSACTION WHICH LED TO IT BEING GIVEN.

The great commercial growth of this age, and the fact that promissory notes have become recognized mediums in the commercial world for the settlement of debts and the exchange and adjustment of credits, each carrying with it certain rights *distinguishable from the common law chose in action,* brought about generally their recognition as *tangible personal property; to that extent usage and custom have modified the common law.*

Their recognition as such by the statutes of the State of New York indicates that the common law notion of a promissory note as evidence only of a debt has passed away in the State of New York.

The State of New York does not give this new attribute to promissory notes held and located outside its domain, but only to such *as are held and located here permanently* as distinguished from property passing through the State in *transitu,* or which may happen to be here temporarily and not there either for purposes of business or to enjoy the protection of its laws.

They are recognized as such by the State of New York in its statutes, which permit their *attachment,* their *replevin,* levy thereon and their *sale* under an execution, all irrespective of the domicile of the maker or holder.

The provision in the Code of Civil Procedure of the State of New York for their attachment, section 649, is as follows:

> "A levy under a warrant of attachment must be made as follows:
> No. 2. Upon personal property capable of manual delivery, including a bond, promissory note, by taking the same into the sheriff's actual custody."

And again they are designated as personal property for the purpose of conferring jurisdiction upon a Surrogate's

Court, section 2478 of the Code of Civil Procedure providing as follows:

> "But the foregoing provision does not apply to a debt evidenced by a bond, PROMISSORY NOTE or other instrument for the payment of money only, in terms negotiable, or payable to bearer or holder. Such a debt, WHETHER THE DEBTOR IS A RESIDENT OR NON-RESIDENT OF THE STATE, is regarded as personal property, at the place where the bond, note or other instrument, is either within or without the State."

Here is another illustration, that the State of New York has disregarded the general principles of the common law, which were recognized as determining the *situs* of simple choses in action, in selecting the promissory note therefrom and giving to it the quality and attribute of a RES.

The presence of this RES, an object, it is true, of legislative creation, gives jurisdiction for the founding of administration in probate proceedings, and equally so in foreign attachment.

The rule enunciated in *Wyman v. Halstead*, 109 U. S., 654, 656, by Mr. Justice GRAY, that "*The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor,*" is consistent with the decision of this Court in *Chicago, Rock Island, etc., Railway v. Strum*, 174 U. S., 715. In this latter case, Mr. Justice MCKENNA declared:

> "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it, he must go to the domicile of the debtor, and can only do it under the laws and procedure in force there. This is a legal necessity and considerations of *situs* are somewhat artificial. If not artificial, whatever of substance there is, must be with the debtor. He and only he has the something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding in *rem*."

Here, however, the statute has created a *res*. It could not create a *res* in case of an ordinary chose in action without jurisdiction over the debtor. Neither of these decisions conflict with the statute which selected the promissory note as a *res, for the reason that it has become as much a specialty as the bond, having absorbed into itself all of the rights it is said to represent and carry.*

The rights and remedies referred to indicate that promissory notes, when physically present in the State of New York, are defined as tangible personal property. To the place where held, the owner must come to obtain them; at such place they may be subject to liens and claims thereon or thereto, which may be *there* determinable, before he can obtain them.

They have a money value where held, and in the case of the Southern Railway Company are quoted publicly in the financial papers of the State of New York as investment property.

Mr. Justice MILLER, in his dissenting opinion, *supra*, said:

> "The debt exists apart from the instrument because a recovery might be had without the instrument."

We submit in answer thereto that at common law, if the owner or holder of a negotiable bill or note lost it, so that it could not be produced at trial, he could not maintain an action thereon.

Rowley v. Bail, 3 Cow., 303.
Kirby v. Sisson, 2 Wend., 550.

Under section 1918 of the Code of Civil Procedure of the State of New York, provision is made for recovery upon lost negotiable instruments, by giving an indemnity bond in twice the amount of the note. This latter provision indicates that the defendant must be protected against the possibility *of someone else being the possessor and owner thereof, a recognition of property rights in the note itself going with its possession.*

POINT IV.

(A) Promissory notes by usage and custom, apart from declaratory statutes, are recognized generally as tangible personal property, and establish by their physical presence a *situs* for all purposes of taxation in the State where located.

New Orleans v. Stempel, 175 U. S., 309.
Blackstone v. Miller, 188 U. S., 189.
Board of Assessors v. Comptoir National, 191 U. S., 388-402.
Sellinger v. Kentucky, 213 U. S., 200.
Matter of Whiting, 2 App. Div., 590.
Matter of Whiting, 150 N. Y., 27.
Burke v. Wells, 184 N. Y., 275; affd. 208 U. S., 14.
People v. Board of Trustees, 48 N. Y., 390.
People v. Smith, 88 N. Y., 576.

That the promissory note is recognized as tangible personal property may be seen in the opinion of this Court written by Mr. Justice HOLMES in *Blackstone v. Miller,* 188 U. S., 189, wherein he declared:

> "We perceive no better reason for denying the right of New York to impose a succession tax on debts owned by its citizens than upon tangible chattels found within the State at the time of his death. *the maxim mobilia sequunter has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way.*
>
> There is no conflict between our views and the point decided in the case reported under the name of State Tax on Foreign Held Bonds, 15 Wall., 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and *negotiable instruments are more than evidences of a debt. The debt is inseparable from the paper which declares and constitutes it* * * *."

In *New Orleans v. Stempel,* 175 U. S., 309, certain promissory notes secured by mortgages on Louisiana real estate but owned by residents of New York were physically located in Louisiana. These notes were assessed and taxed by the tax assessors of *Louisiana statute which enumerated promissory notes as taxable property.*

Mr. Justice BREWER, writing the opinion of this Court sustaining the imposition of a tax upon these notes, held that a promissory note has an independent *situs* of its own and may be properly taxed where located, and declared:

> "The same doctrine was affirmed in *Fisher v. Commissioners,* 19 Kansas, 414, and again in *Blair v. Irby,* 25 Kansas, 499, 501, in which the Court said, *referring to promissory notes: 'They have such an independent situs that they may be taxed where situated.'*"
>
> "'The decisions of the highest Courts of New York, in which State these plaintiffs reside, are to the same effect. In *People v. Trustees,* 48 N. Y., 390, 397, the Court said: *"Notes, bonds and other contracts for the payment of money have always been regarded and treated in the law as personal property.* They represent the debts secured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this *kind of property does not exist where the obligation is held, where does it exist?* It certainly does not exist where the debtor be and follow his person. And while for some purposes of the law, by legal fiction, it follows the person of the creditor and exists where he may be, yet it has been settled that, for the purpose of taxation, this legal fiction does not, to the full extent, apply, and that *such property belonging to a non-resident creditor may be taxed in the place where the obligations are held by his agent. Hoyt v. Commissioners of Taxes,* 23 N. Y., 238; *The People v. Gardner,* 51 Barb., 352; *Catlin v. Hull,* 21 Vermont, 152."'"

At page 322 of the same opinion, Mr. Justice BREWER said:

> "Notes and mortgages * * * may not have become so generally recognized as tangible personal property, *yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation.*"

(B) By the decisions of the New York Courts, irrespective of its declaratory statutes, promissory notes are considered personal property where they are kept.

In *People ex rel. Burke v. Wells*, 184 N. Y., 275, affd. 208 U. S., 14, Mr. Chief Justice CULLEN says at page 279:

> "It is also settled that *the situs for the purpose of taxation of promissory notes* and similar instruments for the payment of money where the 'debt is inseparable from the paper which declares and constitutes it,' is the place where they are actually and physically held (*State Tax v. Foreign Held Bonds*, 15 Wall., 300; *New Orleans v. Stempel*, 175 U. S., 309, and *Blackstone v. Miller*, 188 U. S., 189; *People v. Board of Trustees*, 48 N. Y., 390)."

In *People ex rel. Jefferson v. Smith*, 88 N. Y., 576, Mr. Justice EARL, in his opinion for the Court, says at page 585:

> "It is clear * * * from the understanding of business men in commercial transactions as well as of jurists and legislators, that mortgages, bonds, *bills and notes have for many purposes come to be regarded as property and not as the mere evidences of debts*, and that they may thus have a *situs* at the place where they are found like other visible, tangible chattels."

In *Matter of Fearing*, 200 N. Y., 340, the Court held that bonds of a non-resident decedent physically located

outside the State of New York, although secured by real estate located within the State of New York, were not the subject of a transfer tax. Mr. Justice GRAY, in his opinion for the Court, says at page 345:

> "In the *Whiting* case, 150 N. Y., 27, decided at the same time as was the *Bronson* case, it was expressly stated that the bonds there in question were subject to 'taxation' *on account of their physical presence in this State.*"

This latter case may be said to represent the State of New York's interpretation of the status of security located in a State other than where the *situs* of the obligation which it secures may be said to be. It is clear from this decision that the *situs* of the security does not change, nor have any consideration in determining the *situs* of promissory notes under its statutes. The plaintiffs-in-error have urged the possibility of their being subject to a transfer tax upon the transfer of the real estate securing these notes, in the State where it is situated, and which latter consideration is urged as permitting possibly triple taxation; one at the domicile of the decedent under the principles of universal succession, a second in the State of New York where the notes were kept, and a third in the State where the security lies; none of these arguments, however, can invalidate this tax, for each is imposed under different principles and statutes, and each by a different sovereign power.

The Courts of the State of New York have very consistently held that bonds have a *situs* where physically present, and the fact that they are secured by real estate in the State of New York, although actually located without the State, has not been construed to give jurisdiction over the thing sought to be reached, to wit: the instrument of transfer.

Under the statute of the State, construed by its Courts to include promissory notes as tangible personal property when located and held within the State, *the State of New*

York now applies the same principles to a note as to a bond. Matter of Fearing, supra, may be said to express the same test of jurisdiction over promissory notes as of bonds, to wit: the requisite physical presence of the instrument of transfer within the domain of the State.

POINT V.

(A) There are fundamental differences between a property tax, and an inheritance or succession tax. The conditions deemed essential to establish a situs in the taxing State as a basis for a property tax, are not essential to justify the imposition of a transfer succession or inheritance tax.

Cahen v. *Brewster,* 203 U. S., 552.
Orr v. *Gilman,* 183 U. S., 278.
Knowlton v. *Moore,* 178 U. S., 41.
Magoun v. *Illinois Trust & Savings Bank,* 170 U. S., 283.
United States v. *Perkins,* 163 U. S., 625.
Wallace v. *Meyer,* 38 Fed. Rep., 184.

In *Knowlton* v. *Moore,* 178 U. S., 41, Mr. Justice WHITE, now Chief Justice, elaborately went over the history of taxation on successions, and the character in which it had been viewed, citing case after case to show that this tax is distinguished from taxation on property, and free from certain of the constitutional limitations upon the latter tax, and cited the decision of this Court in *United States* v. *Perkins,* 163 U. S., 625, 628, 629 and 630, to illustrate the fundamental difference, quoting the opinion of Mr. Justice BROWN in the case cited, as follows:

> (628) "The tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its

contribution to the state that it becomes the property of the legatee."

(629) "That the tax is not a tax upon the property itself, but upon its transmission by will or descent, is also held both in New York and in the several states."

(630) "We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is upon the legacy before it reaches the hands of government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

After quoting the foregoing sections of the opinion in *United States* v. *Perkins,* Mr. Justice WHITE, continuing, declared:

"That death duties, generally, have been from the beginning in all countries considered different from taxes levied on property, real or personal, directly on account of its ownership and possession thereof, is demonstrated by the review which we have previously made."

The conditions which existed in *United States* v. *Perkins* and *Wallace* v. *Meyer, supra,* would not have permitted a property tax upon property exempt from taxation, yet the tax imposed upon their transfer was upheld in each case by this Court.

In *Hertz* v. *Woodman,* 218 U. S., 205-219, whose issues concerned the War Revenue Act of 1896, and its repealing Act of 1902, Mr. Justice LURTON, answering the objections of the plaintiff in error that the classifications in the statute were in contravention to the Federal Constitution, declared:

"The contention of the plaintiff in error that the statute denied equal protection of the laws, and

that the classification was purely arbitrary, rests on the theory that the tax is one on property; in fact, it is one on the right of inheritance."

(B) The Court of Appeals of the State of New York has construed the statute imposing this tax as a tax upon the right to particular successions, and not upon the property.

In re Swift, 137 N. Y., 77-78.
In re Merriam, 141 N. Y., 479-480-484.
In re Hoffman, 143 N. Y., 329-331.
In re Cullum. 145 N. Y., 593.
In re Sherman, 153 N. Y., 1-6.
In re Dows, 167 N. Y., 227-232.
In re Vanderbilt, 172 N. Y., 69-72-74.

(C) This interpretation of the tax as a tax upon the right of testamentary successions has been uniformly recognized by the Supreme Court of the United States.

Mager v. *Grima*, 8 How., 490.
Wallace v. *Meyer*, 38 Fed. Rep., 184.
U. S. v. *Perkins*, 163 U. S., 625, 628, 629 and 630.
Knowlton v. *Moore*, 178 U. S., 41, 55, 57, 59.
Blackstone v. *Miller*, 188 U. S.. 189-203.
Plummer v. *Coler*, 178 U. S., 115-119-121-122.
Magoun v. *Illinois Trust Co.*, 170 U. S., 283.
Chanler v. *Kelsey*, 205 U. S., 466.
Louisville & Nashville R. R. Co. v. *Melton*, 218 U. S., 36.
Billings v. *Illinois*, 188 U. S., 97-104.
U. S. v. *Fox*, 94 U. S., 315.

(D) The enactment of rules, regulations and principles governing the transmission of property by will, intestacy or other convey-

ances testamentary in character and effect are within the exclusive province of the State. The Supreme Court of the United States will look to the statutes of the State for the rules governing the descent and testamentary transfer, alienation and succession of property. This Court will not only adopt but is bound by the decisions of the highest courts of the States as to the effect and interpretation of wills and instruments of title.

Orr v. *Gilman,* 183 U. S., 278-283-290.
De Vaughn v. *Hutchinson,* 165 U. S., 566-570.
Clarke v. *Clarke.* 178 U. S., 186-190.
Magoun v. *Illinois Trust Co.,* 170 U. S., 283.
Yazoo & Miss. Valley R'd v. *Adams,* 181 U. S., 580-583.
Eastern B. & L. Assn. v. *Ebaugh,* 185 U. S., 114-132.
Louisville & Nash. R. R. Co. v. *Melton,* 218 U. S., 36.
Leffingwell v. *Warren,* 2 Black., 599-603.
Randall v. *Brigham,* 7 Wall., 523-541.
Morley v. *Lake Shore R. R. Co.,* 146 U. S.. 162-163-167.
Moffitt v. *Kelly,* 218 U. S., 400-405.

(E) This Court will also be bound by the decision of the highest Court of the State that there is nothing in the statute or its enforcement in conflict with the Constitution of the State, and that the proceedings taken therein for its ascertainment did not deprive the plaintiffs in error of their property without due process of law within the meaning of the State Constitution.

People ex. Met. St. R'way Co. v. *N. Y. State Board of Tax Commrs.*, 199 U. S., 1-47.
Orr v. *Gilman*, 183 U. S., 278-283.
Carpenter v. *Pennsylvania*, 17 How., 452.
Wallace v. *Myers*, 38 Fed. Rep., 184.

(B) In *Yazoo* v. *Miss. Valley R. R. Co.*, 181 U. S., 580-583, upon the interpretation and construction of a statute by the highest Court of the State, it was declared:

> "Assuming that we may exercise an independent judgment respecting the construction * * * the right asserted depends upon comparison and construction of such statute and the settled rule of this Court, is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of the construction of the State statute which has been adopted by the Court of last resort of the State."

POINT VI.

Buck v. _Beach_ went no further than to hold that under the facts presented by the record, the promissory notes were held but temporarily in the State of Indiana, and that therefore a situs as a basis for a property tax, had not been established.

We submit that the United States Supreme Court did not, in *Buck* v. *Beach*, establish the rule attributed to it, and that the dissenting Justices of the Appellate Division were in error to read such a rule into this Court's decision; and that the Court of Appeals, which unanimously affirmed the decision of the Appellate Division, adopting the opinion of Mr. Justice McLaughlin, *supra*, correctly construed the decision in *Buck* v. *Beach* as being neither applicable nor controlling upon the right of the State

of New York to impose a transfer tax upon the transfer of these notes.

Furthermore the decision in *Buck* v. *Beach* took up the Indiana Statute and the right of that State to IMPOSE a property tax upon certain notes, *which this Court held were there but* TEMPORARILY, and went no further than to hold that under the facts presented by the record, a situs as basis for taxation thereon had not been established.

This Court expressly left open any question which might arise under the inheritance or succession tax laws, declaring in positive terms that a different test is applicable in testing the right of a State to impose a transfer tax. Mr. Justice PECKHAM, writing the opinion for the Court, declared:

> "Cases arising under the collateral inheritance tax or succession cases have been cited as affording foundation for the right to tax as herein asserted. *The foundation* upon which such act rests is different from that which exists where the assessment is levied upon property. The succession or inheritance tax is not a tax upon property, as has been frequently held by this Court. (*Knowlton* v. *Moore*, 178 U. S., 41, and *Blackstone* v. *Miller*, 188 U. S., 189). and therefore the decisions arising under such inheritance tax cases are not in point."

It is clear that this Court did not recognize inheritance or succession tax cases as controlling upon the right of any State to impose a property tax, and by the same reasoning, *Buck* v. *Beach* is neither applicable nor controlling upon the right of the State of New York to impose a transfer tax upon the notes in question.

Moreover, the case of *Buck* v. *Beach* construed an Indiana statute, levying a tax upon personal property. There was no statute in Indiana defining *personal property*, in any way similar to the definition contained in the Statutory Construction Law of the State of New

York, so that we may assume that at the most this Court dealt with the common law notions of the *situs* of the promissory notes, unmodified by any statute of Indiana.

The following quotation is from the brief of the plaintiffs in error in *Buck* v. *Beach,* filed in the office of the United States Supreme Court prior to argument:

> "There is no Statute of Indiana concerning the taxation of the transfer of property by death or otherwise; or the taxing of title papers or written instruments themselves, apart and distinguished from the property interests or rights to which they related, or by which they were evidenced."

It would seem from this statement, that they rested their argument mainly upon the fact that the common law remained unchanged, and that when applied to a *tax upon property,* a promissory note must be viewed and governed by the common law.

Later, in *Sellinger* v. *Kentucky,* 213 U. S., 200, Mr. Justice HOLMES, who wrote the opinion in the transfer tax case of *Blackstone* v. *Miller* (*supra*). at page 204 of his opinion cites *Buck* v. *Beach,* 206 U. S., 392, and refers to the opinion of Mr. Justice DAY, who said (page 412):

> "It is well settled that bank bills and municipal bonds are in such a concrete, tangible form that they are subject to taxation where found, irrespective of the domicile of the owner, are subject to levy and sale on execution and to seizure and delivery upon replevin; and yet, they are but promises to pay, evidences of existing indebtedness. NOTES AND MORTGAGES ARE OF THE SAME NATURE; AND WHILE THEY MAY NOT HAVE BECOME SO GENERALLY RECOGNIZED AS TANGIBLE PERSONAL PROPERTY, YET THEY HAVE SUCH A CONCRETE FORM THAT WE SEE NO REASON WHY A STATE MAY NOT DECLARE THAT, IF FOUND, WITHIN ITS LIMITS, THEY SHALL BE SUBJECT TO TAXATION."

Sellinger v. *Kentucky* may thus be invoked by the defendant in error as indicating a sanction and endorsement by this Court of the statements in the opinion of Mr. Justice DAY, which recognized promissory notes as tangible personal property where held, and is in harmony with the similar declaration of this Court in *Blackstone* v. *Miller,* that:

> "Bonds and negotiable instruments are more than evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. 177 Massachusetts, 335, 337."

POINT VII.

(A) It is well settled that the interpretation and construction placed by the highest court of the State upon its statutes is conclusive upon this Court.

Smiley v. *Kansas,* 196 U. S., 447.
Hibben v. *Smith,* 191 U. S., 310.
Blackstone v. *Miller,* 188 U. S., 189-207.
Watson v. *Maryland,* 218 U. S.. 173-175.
Kentucky Union Co. v. *Com. of Kentucky,* 219 U. S., 140-151.
Tilt v. *Kelsey,* 207 U. S., 43-56.
Lindsley v. *Natural Car. Gas Co.,* 220 U. S., 61.
Moffit v. *Kelly,* 218 U. S., 400.

This tax is levied in obedience to the law of the State, and the question presented to the State Courts was whether or not a transfer of these notes had taken place within its State according to its statutes, and its jurisprudence.

The Court of Appeals has found that these promissory notes were tangible personal property within the State at

decedent's death by virtue of the declaratory law of the State; that they had a situs in its State by virtue of their physical presence in its State; and that a transfer thereof took place in the State of New York within the purport and intendment of the Transfer Tax Law of the State.

In *Eastern Bld. Loan Assn.* v. *Ebaugh,* 185 U. S.. 114-122, it was said:

> "A necessary element in both propositions (if they may be regarded as independent) is the law of New York, and in the latter is involved not only what the statutory law is, but what its application is under the decision of the Courts of that State. Both, as we have seen, were facts to be found, *and the finding upon which is binding upon us.*"

In *Moffit* v. *Kelly,* 218 U. S., 400-405, this Court, taking up the decision of the highest Court of the State of California as determining the time of vesting of a wife's rights in community property, and the application of the statute, said:

> "This would be the case, because as there was State power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely State question not involving any violation of the Constitution of the United States, which therefore we have no right to review."

And again answering the claim that the statute by selecting the time of vesting of the wife's interest in community property, to-wit, at the death of her husband, as the time for the imposition of a succession time, had deprived her of property without due process of law, in violation of the Federal Constitution, said:

> "It is elementary that the Constitution of the United States does not, generally speaking, control

> the power of the state to select and classify objects of taxation."

And denying the claim of the plaintiff-in-error that the determination of the State Court be reviewed by the Court as a matter of right, said:

> "But this merely rests upon the mistaken conception previously disposed of, since the nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question, which we have no right to review."

The following cases contain expressions of this Court, in which the exclusive right of the State Courts to construe and interpret instruments of title is recognized.

In *Chanler* v. *Kelsey,* 205 U. S., 477, was declared:

> "In other words, the Court of Appeals of New York had the exclusive right to construe instruments of title in that State, and determine for itself the creation and vesting of estates through wills under the laws of the State."

In *Cahen* v. *Brewster,* 203 U. S., at 551, was declared:

> "We must turn back, therefore to the law of Louisiana for the solution of the questions presented in the case at bar. But we are not required to reconcile the Louisiana decisions. We accept that in the case at bar as a correct interpretation of the Code of the State."

Although the assessment of the tax in *Orr* v. *Gilman,* 183 U. S., 278-282, was made under another sub-division of the Transfer Tax Law of the State of New York, this Court held that the construction which the State Court had placed upon this statute, to-wit: defining the particular act of transfer held subject to the tax, was not in violation of the Fourteenth Amendment, nor of Article I, Section 10, of the Constitution of the United States.

Mr. Justice SHIRAS, writing the opinion of this Court, declared:

> "While it is settled law that this Court will follow the construction put by the State Courts upon wills devising property situated within its state, and while it is also true that we adopt the construction of its own statutes by the State Courts, a question may arise whether the statute as so construed imports a violation of any of the rights secured by applicable provisions of the Constitution of the United States. This Court has no authority to revise the statutes of New York upon any ground of justice, policy or consistency to its own constitution. Such questions are concluded by the decisions of the legislature and judicial authorities of the State."
>
> "These views of the Court of Appeals must be accepted by us as accurate statements of the law of the State, and although it is claimed in the brief of counsel for the plaintiff in error that such a construction of the transfer tax law brings it in conflict with the Federal Amendment of the Constitution of the United States, we are unable to approve such a contention. The subject dealt with is one of State law, expounded by State Courts. The laws and the construction put upon them apply equally to all persons in a like situation, and cannot be regarded as conflicting with the provisions of the Federal Constitution. *Magoun* v. *Illinois Trust Co.*, 170 U. S., 283."

And continuing upon the particular construction which the Courts of New York had placed upon the particular successions held subject to the provisions of the Transfer Tax Law, said:

> "This conclusion is binding upon this Court insofar as it involves a construction of the will and of the statute."

(B) In respect to the succession to property by death the States are sovereign, and may give to their courts authority to determine finally as against all the world all ques-

tions which arise therein, subject to applicable constitutional limitations.

McElroy on the Transfer Tax Law, 2.
Tilt v. *Kelsey,* 217 U. S., 43.

It must be conceded that the determination of the Surrogate's Court, with its affirmance by the highest Court of the State, that each promissory note had a SITUS in the State of New York at the death of the decedent, and that their transfer in that State was subject to the provision of the Transfer Tax Law of the State of New York, presents matters of judicial construction and interpretation upon questions *solely of State cognizance and jurisprudence.*

And it must be assumed and taken by this Court that in giving to each note a situs in the State of New York *at such time,* to-wit, the death of the owner, that the Courts of the State of New York duly construed its recognized principles of law applicable to the determination of their SITUS, as defined by its statutes, and that as to the United States Supreme Court, to whom this appeal has come, such construction and determination are final, are matters purely of local cognizance and judicial interpretation by which this Court is bound.

That this Court will look to the statutes of the State as to the descent and testamentary transfer, alienation and succession of property, and will not only adopt, but is bound by, the decisions of the highest Courts of the State, as to the construction and interpretation of instruments of title and the application of the statutes to them, has been repeatedly expressed by this Court.

This Court in *Gulf and Ship Island Railway Company* v. *Hewes,* 183 U. S., 66-75-76, declared:

> "This Court has repeatedly held that we cannot revise a judgment of the highest Court of a State

unless by its terms or necessary operation it gives effect to some provision of a State constitution or law which, as thus construed, impairs the obligation of a precedent contract. In *Railroad Co.* v. *Rock*, 4 Wall, 177, 181, this court pronounced it a "fundamental error, that this court can, as an appellate tribunal, reverse the judgment of a State court because that court may hold a contract to be void, which this court may hold to be valid." So, too, in *Knox* v. *Exchange Bank*, 12 Wall, 379-383, it was said by Mr. Justice MILLER, 'But we are not authorized by this judiciary act to review the judgments of the State courts because their judgments refuse to give effect to valid contracts, or because those judgments in their effect impair the obligation of contracts. If we did, every case decided in the State courts could be brought here when the parties setting up a contract alleged that the court has taken a different view of its obligations to that which we held.'" To the same effect are *Lehigh Water Co.* v. *Easton*, 121 U. S., 388, 392, and *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S., 18, 30. In the latter case it is said by Mr. Justice GRAY:

"In order to come within the provisions of the Constitution of the United States, which declare that, "No State shall pass any law impairing the obligation of contracts," not only must the obligations of a contract have been impaired, but it must have been impaired by a law of the State. *The prohibition is aimed at the legislative power of the State and not at the decisions of its courts*, the acts of administrative or executive boards or officers or the doings of corporations or individuals' (see *Central Land Co.* v. *Laidley*, 159 U. S., 103-109)."

Nor have any of the alleged rights of the plaintiffs in error under the Federal Constitution been impaired or violated by the determination of situs of these promissory notes by the highest Court of the State of New York. Such adjudication comes within the principles enunciated

in *Bristol* v. *Washington Co.*, 177 U. S., 133-141, wherein Mr. Chief Justice FULLER declared:

> "And we are unable to perceive that any rights secured by the Federal Constitution were infringed by the Statutes as thus interpreted *so far as the situs of these loans and mortgages were concerned.*"

POINT VIII.

The objection that the Statutory Construction Law, now General Construction Law, might under its terms, without further test, comprehend various instruments of title without legal justification, cannot be made by transferees of promissory notes.

The Statute as a whole cannot be attacked except so far as it has included promissory notes, whose situs has been determined by the statute and upheld by the decision of the Court of Appeals.

On pages 22, 24 and 25 of plaintiffs' brief, reference is made to the lack of justification for the inclusion of bills of lading and life insurance policies held by non-residents, but physically present within the State, in the Statutory Construction Law, now General Construction Law of the State of New York, and to the fact that under the general definitions in that law, such instruments and even deeds to real estate situated in another State may be as well comprehended within the terms of the statute as promissory notes.

We urge the vital distinctions that exist between these various instruments, as justification for its inclusion in the statute, and in support of the decisions of the State Courts holding a promissory note to be within the intendment of the statute, and that under the principles of an inheritance or succession tax, a transfer of a promis-

sory note is deemed to take place in the State of New York by virtue of its physical presence in the State.

The vital distinction between promissory notes and bills of lading would be an important and perhaps determining feature in a property tax.

> *Friedlander* v. *Texas etc. R'way Co.*, 130 U. S., 416.

The distinction between a promissory note and a life insurance policy is recognized in *Matter of Horn*, 39 Misc., 133 (N. Y.), noted on page 22 of plaintiff's brief. We cite this case as illustrating the protection which the Courts of the State of New York gave to the non-resident holder of such an instrument, which plaintiffs in error suggest would come literally within the definitions of the statute, and might be comprehended therein without further test. The Courts required justification for its inclusion, holding that there was no legal justification for imposition of a transfer tax upon its transfer; that such an instrument represented but a chose in action, a contract which might or might not be enforceable, and which chose in action had a situs at the domicile of the decedent.

In urging these possible objections against the constitutionality of the statute, were it applied to these instruments, we submit that such attack is unjustifiable.

A similar objection was raised in *Matter of Keeney*, 194 N. Y., 281, affirmed by this Court in 222 U. S., 525, in which the graduations of the tax and the classifications of persons were attacked by a class whose transfers bore the lowest tax. In answer to their claims that the graduated rates and classifications rendered the entire act unconstitutional even as to them, Mr. Chief Justice CULLEN declared:

> "As to the first objection, the grantees in the deed in this case being children of the grantor, are subject to the lowest rate of taxation (with the

> exception of certain objections which would not invalidate the law). *Beers* v. *Glynn*, 211 U. S., 477, and we cannot see that they have any valid cause for complaint, that other grantees are subject to a higher rate. That objection, if tenable, could only be taken by grantees taxed at the higher rate, and even if good, would not render the statute void in entirety."

This declaration is equally applicable to the objections here raised, as to the *possible inclusion* of the other instruments referred to, and to the fact that the only instruments whose situs is here raised, are the promissory notes herein described.

That the Fourteenth Amendment does not affect or control the States in the exercise of their sovereign authority to regulate inheritances and to determine the persons or objects upon which an inheritance tax shall be imposed, is recognized in *Campbell* v. *California*, 200 U. S., 94, in which case the Court declared:

> "We do not stop to refer in detail to the many forms of argument by which the contention is sought to be sustained, but content ourselves with stating that, whatever be the form in which the propositions relied on are advanced, they all reduce themselves to and must depend upon the soundness of the contention that the Fourteenth Amendment compels the States, levying inheritance taxes, and *a fortiori* in regulating inheritances, to conform to blood relationship. That is to say, in their last analysis all the arguments depend upon the proposition that the Fourteenth Amendment has taken away from the States their power to regulate the passage of property by death or the burdens which may be imposed resulting therefrom, because that amendment confines the States absolutely, both as to the passage of such property and as to the burdens imposed thereon, to the rule of blood relationship. To state the proposition is to answer it. Its unsoundness is demonstrated by previous decisions of this Court. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S., 283; *Orient In-*

> *surance Co.* v. *Daggs*, 172 U. S., 557-562. It is true that in the first of the cited cases it was expressly declared or impliedly recognized that in the exercise by a State of its undoubted power to regulate the burdens which might be imposed on the passage of property by death a case might be conceived of where a burden would be so arbitrary as to amount to a denial of the equal protection of the laws. But this suggestion did not imply that the effect of the Fourteenth Amendment was to control the States in the exercise of their plenary authority to regulate inheritances and to determine the *persons or objects upon whom an inheritance burden may be imposed*. In this case there can be no doubt, if the right of a State be conceded to select the persons who may inherit or upon whom the burden resulting from an inheritance may be imposed, the complaint against the statute is entirely without merit."

In *Heath-Milligan Company* v. *Worst*, 207 U. S., 338-354, this Court, in taking up certain classifications essential to the proper enforcement of the Statute, said:

> "We will omit from citation the cases in which this Court passed upon the power of the States to classify objects for purpose of Government. * * * We have declared many times and illustrated the declaration must have relation to the *purpose of the* LEGISLATURE. A classification may not be merely arbitrary, but necessarily there must be a great deal of freedom." (Citing *Mobile* v. *Kimball*, 102 U. S., 691.)

We urge the vital distinctions that exist between promissory notes and the other instruments referred to, as justifying the selection and inclusion of the former in the Statute, and in support of the decisions of the State holding that they come within the purport and intendment of the Statute by virtue of their physical presence within the State.

These distinctions alone justify their selection as objects of a property tax. While the tax sought to be reviewed

here is a transfer tax, and not a property tax, we may fairly urge their liability to a property tax under the Statute, as an answer to the inferences sought to be drawn by the learned counsel to the plaintiffs-in-error, from the decision in *Buck* v. *Beach*, that promissory notes still retain, without modification, their common law character of being but evidences of debt, with a situs at the domicile of the creditor.

In justifying the imposition of a transfer tax, upon the transfer that takes place within the State where they are kept and located, and which tax does not require the same test as a property tax, we still have present, as element deemed essential for taxation of the property of a non-resident, to wit: jurisdiction over the *thing*.

That a tax may be imposed at the domicile of the owner, upon the principles of universal succession, or that a further tax may be imposed by the State where the security lies, upon the principle that the security is there transferred irrespective of the situs of the obligation which it secures, cannot prevent the State of New York by any argument of its alleged injustice, from imposing a transfer tax by reason of the physical presence of the *instrument of transfer*.

The existence and possession of promissory notes offer more than the "certain conveniences" suggested in plaintiffs' brief, but upon the contrary they represent a new form of tangible personal property; and the modern notion of being such, is as much justified to-day as was the recognition of a bond as a specialty, justified in the days of its inception, an anomaly that "by a notion going back to the very early law, the obligation is or originally was inseparable from the paper or parchment which expressed it."

Bearing in mind the growth and development of the laws relating to promissory notes and negotiable instruments, and also that by usage, custom and the declaratory law of the State of New York, *they are deemed to sym-*

bolize in themselves the full value of the obligation represented thereby, and that "the debt is inseparable from the paper which declares and constitutes it," we submit that the plausible citations of the learned counsel to the plaintiffs-in-error are not longer applicable to the conditions of to-day.

We submit, therefore, that the recognition of promissory notes as tangible personal property with a situs where held, was within the sovereign power of the State, and that having such power, the Legislature has not deprived the plaintiffs-in-error of any property within the inhibitions of the Federal Constitution; further, that the construction which the State Courts placed upon its statutes, construing promissory notes owned by a non-resident but physically present and kept in the State of New York, to be within the intendment of the Transfer Tax Law, and subject to its provisions, has not raised any question under the Federal Constitution justifying this appeal to the United States Supreme Court.

Wherefore, we respectfully submit that this Writ of Error should be dismissed with costs to the defendant-in-error.

WILLIAM LAW STOUT,
For the Comptroller of
the State of New York,
Defendant-in-error,
New York, N. Y.

WHEELER *v.* SOHMER, COMPTROLLER OF THE STATE OF NEW YORK.

ERROR TO THE SURROGATES' COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

No. 45. Argued November 5, 6, 1913.—Decided April 20, 1914.

The provision in the New York Inheritance Tax Statute, imposing a transfer tax on property within the State belonging to a non-resident at the time of his death, is not unconstitutional under the due process clause of the Fourteenth Amendment as applied to promissory notes the makers of which are non-residents of that State. *Buck* v. *Beach*, 206 U. S. 392, distinguished.

202 N. Y. 550, affirmed.

THE facts, which involve the power of a State to tax promissory notes located in the State although neither the owner nor the maker are residents thereof, are stated in the opinion.

Mr. Charles P. Howland for plaintiffs in error:

The taxation of the full value of the debts represented by these promissory notes deprived the executors and beneficiaries of the estate of their property without due process of law, and was in contravention of the Fourteenth Amendment.

Jurisdiction of a State for purposes of transfer or in-

heritance taxation is limited to property within the State, in the senses in which that phrase has been recognized. *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395.

Promissory notes are only evidences of debt and not the debts themselves. Their situs, therefore, is not the situs of the debts; the situs of the debts is at the residence of one or the other of the parties to the relation. *Buck* v. *Beach*, 206 U. S. 392; *Pelham* v. *Way*, 15 Wall. 196.

As to the distinction between a debt and the evidence establishing it, see *Wyman* v. *Halstead*, 109 U. S. 654; *Attorney General* v. *Bouwens*, 4 M. & W. 171, 191; *Hunter* v. *Supervisors*, 33 Iowa, 376; Hanson's Death Duties (4th ed.), p. 239.

A note is the representative of a debt as a warehouse receipt is the representative of personal property, but such a receipt cannot be taxed at the value of the goods on the theory that in some way it represents them. *Selliger* v. *Kentucky*, 213 U. S. 200.

The special factors which warrant inheritance taxation upon choses in action belonging to the estates of non-resident decedents—control over the person of the debtor or over the means of enforcement of the obligation—do not exist here. *Blackstone* v. *Miller*, 188 U. S. 189 (semble).

In the case of choses in action the State of the owner's domicile levies one tax, *Matter of Swift*, 137 N. Y. 77, while the State of the debtor's domicile levies a tax "not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor"—in other words, because it grants a practical privilege by providing means for the collection of the debt. *Blackstone* v. *Miller*, 188 U. S. 189; *Matter of Houdayer*, 150 N. Y. 37.

In this case the State of the decedent had no control over the persons of the debtors. That control was in the States of the debtors, *Buck* v. *Beach*, 206 U. S. 392, 407; *Chicago, R. I. & P. R'y* v. *Sturm*, 174 U. S. 710, 715, and

as neither the universal succession nor the control over the means of enforcement was granted or could be regulated by the former State, that State had no power to tax.

The situs of bonds appears to determine the situs of the debts they symbolize, but bonds have always been sharply distinguished from promissory notes in that regard.

For certain purposes bonds have a peculiar recognition in the common law, and for purposes of taxation, annual or inheritance, are often treated as having a situs dependent upon their physical whereabouts. *Matter of Bronson*, 150 N. Y. 1; *Matter of Fearing*, 200 N. Y. 340; *State Tax on Foreign Held Bonds*, 15 Wall. 300.

But the rule does not embrace promissory notes. *Buck* v. *Beach*, 206 U. S. 392, 403.

This distinction between bonds and promissory notes has a historical basis. *Selliger* v. *Kentucky*, 213 U. S. 200, 204.

A promissory note may be the subject of larceny. *People* v. *Ogdensburgh*, 48 N. Y. 390, 397; *Buck* v. *Beach*, 206 U. S. 407.

At common law a promissory note was not within the law of larceny, *Regina* v. *Watts*, 6 Cox, C. C. 304, but certificates of stock, warehouse receipts and policies of insurance are unquestionably the subjects of larceny (Penal Law of New York, 1909, c. 88), although none of them is the property whose situs determines the power of annual or of inheritance taxation. *Matter of James*, 144 N. Y. 6; *Selliger* v. *Kentucky*, 213 U. S. 200; *Matter of Horn*, 39 Misc. (N. Y.) 133.

Taxation rests upon protection as a correlative, and when no protection is either practically or theoretically possible, taxation should not be laid: this is the broad basis for the rules limiting taxation. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Matter of Bronson*, 150 N. Y. 1; Cooley on Taxation (3d ed.), p. 3.

In this case the State of testator's domicile may tax, and indeed does so (Public Laws of Connecticut, 1903, c. 63), because it protects the universal succession.

The States of the debtors may tax, because they protect the debts by affording recourse to their respective courts. *Matter of Daly*, 100 App. Div. (N. Y.) 373; *S. C.*, 182 N. Y. 524; *Matter of Clinch*, 180 N. Y. 300.

But New York has protected nothing.

If such taxation is allowed, triple taxation on many kinds of choses in action is possible; in the case of a bill of exchange issued in multiplicate, the domiciliary States of the owner and of the primary obligor would be able to tax, and also each State within which one of the multiplicate bills happened to be found at the owner's death.

Mr. William Law Stout for defendant in error.

MR. JUSTICE HOLMES delivered the judgment of the court.

This proceeding began with a petition by an executor, acting under ancillary letters, for the appointment of an appraiser to determine the amount, if any, of the transfer tax due from the estate of the deceased testator, Charles C. Tiffany. Tiffany was not a resident of New York at the time of his death but left in a safe deposit box in New York four promissory notes made by Pottinger, a resident of Chicago, secured by mortgages of Chicago land to Illinois trustees, and promissory notes of the Southern Railway Company, a Virginia corporation. The appraiser held these notes taxable under the New York laws of 1905, c. 368, § 1, amending § 220 of an earlier law and imposing a tax "when the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death." The Sur-

rogate confirmed the appraiser's report, and his order was affirmed by the Appellate Division and the Court of Appeals. 143 App. Div. 327. 202 N. Y. 550. The Executors contend that the tax deprives them of their property without due process of law.

In support of this position it was argued that if bonds were subject to taxation simply because of their presence within the jurisdiction it was due to the survival of primitive notions that identified the obligations with the parchment or paper upon which they were written, that bills and notes had a different history, and that there was no ground for extending the conceptions of the infancy of the race to them. It was pointed out that the power to tax simple contracts depends upon power over the person of one of the parties and does not attach to documentary evidence of such contracts that may happen to be within the jurisdiction. Cases were cited in which this court has pronounced bills and notes to be only evidences of the simple contracts that they express, *Pelham* v. *Way*, 15 Wall. 196; *Wyman* v. *Halstead*, 109 U. S. 654, 656, and the precise issue was thought to be disposed of by *Buck* v. *Beach*, 206 U. S. 392. We shall discuss this case, but for the moment it is enough to say that for the purposes of argument we assume that bills and notes stand as mere evidences at common law.

But we are bound by the construction given to the New York statutes by the New York courts, and the question is whether a statute that we must read as purporting to give to bills and notes within the State the same standing as bonds for purposes of taxation, goes beyond the constitutional power of the State. Again for the purposes of argument we may assume that there are limits to this kind of power; that the presence of a deed would not warrant a tax measured by the value of the real estate that it had conveyed, or even that a memorandum of a contract required by the statute of frauds would not sup-

port a tax on the value of the contract because it happened to be found in the testator's New York strong box. But it is plain that bills and notes, whatever they may be called, come very near to identification with the contract that they embody. An indorsement of the paper carries the contract to the endorsee. An indorsement in blank passes the debt from hand to hand so that whoever has the paper has the debt. It is true that in some cases there may be a recovery without producing and surrendering the paper, but so may there be upon a bond in modern times. It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes, as no one would doubt in the case of bank notes, which technically do not differ from others. It would be an extraordinary deduction from the Fourteenth Amendment to deny the power of a State to adopt the usages and views of business men in a statute on the ground that it was depriving them of their property without due process of law. The necessity of caution in cutting down the power of taxation on the strength of the Fourteenth Amendment often has been adverted to. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 434. Unless we are bound by authority, we think the statute, so far as we now are concerned with it, plainly within the power of the State to pass.

As to authority, it has been asserted or implied again and again that the States had the power to deal with negotiable paper on the footing of *situs*. "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; . . . Notes and mortgages are of the same nature . . . we see no reason why a State may not declare that if found within its limits they shall be subject to taxation." *New*

Orleans v. *Stempel*, 175 U. S. 309, 322, 323. *Bristol* v. *Washington County*, 177 U. S. 133, 141. *State Board of Assessors* v. *Comptoir National d'Escompte*, 191 U. S. 388, 403, 404. *Metropolitan Life Insurance Co.* v. *New Orleans*, 205 U. S. 395, 400, 402. This is the established law unless it has been overthrown by the decision in *Buck* v. *Beach*, 206 U. S. 392.

No such effect should be attributed to that case. The Ohio notes in Buck's hands that were held not to be taxable in Indiana were moved backward and forward between Ohio and Indiana with the intent to avoid taxation in either State. 206 U. S. 402. They really were in Ohio hands for business purposes, *ibid.*, 395, and sending them to Indiana was spoken of by Mr. Justice Peckham as improper and unjustifiable. *Ibid.* 402. Their absence from Ohio evidently was regarded as a temporary absence from home. *Ibid.* 404. And the conclusion is carefully limited to a refusal to hold the presence of the notes "under the circumstances already stated" to amount to the presence of property within the State. A distinction was taken between the presence sufficient for a succession tax like that in this case, and that required for a property tax such as then was before the court, and the only point decided was that the notes had no such presence in Indiana as to warrant a property tax. See *New York Central & Hudson River R. R. Co.* v. *Miller*, 202 U. S. 584, 597. If *Buck* v. *Beach* is not to be distinguished on one of the foregoing grounds, as some of us think that it can be, we are of opinion that it must yield to the current of authorities to which we have referred.

In the case at bar it must be taken that the safe deposit box in which the notes were found was their permanent resting place and therefore that the power of the State so repeatedly asserted in our decisions could come into play.

Judgment affirmed.

MR. JUSTICE MCKENNA, concurring.

I concur in the result, but cannot concur in the reasoning of the opinion, or rather its controlling proposition unmodified. I might pass it by in silence if it did not have larger consequence than the decision of the pending case. The opinion is rested on the proposition, said to be based on authority, that the States have power to deal "with negotiable paper on the footing of situs," that is, to regard such paper so far concrete and tangible as to be of itself a subject of taxation, irrespective of the domicile of its owner or, I add, the locality of the debt which it represents. For the proposition announced, Mr. Justice Brewer, in *New Orleans* v. *Stempel*, 175 U. S. 309, is quoted from. Other cases are cited and it is said to be established law unless it has been overthrown by the decision in *Buck* v. *Beach*, 206 U. S. 392. I refrain from meeting the judgment of my brethren by simply opposing assertion, and I feel constrained to review the cases, including *Buck* v. *Beach*. I will do so in the order of their decision.

Commencing with the *Stempel Case* I may immediately say of it that its facts did not call for the broad and general declaration it is adduced to sustain. The statute passed on did not attempt to tax negotiable paper simply because of its presence in the State. It regarded the origin and use of such paper and declared its (the statute's) purpose to be that no non-resident, by himself or through an agent, should transact business in the State "without paying to the State a corresponding tax with that exacted of its own citizens," and, to execute the purpose, declared: "All bills receivable, obligations or credits arising from the business done in this State are hereby declared assessable within this State, and at the business domicil of said non-resident, his agent or representative."

The property assessed was inherited by Stempel's wards, they and she being residents of the State of New York. It

was assessed to the estate of the grandfather of the wards, and was $15,000, "money in possession, on deposit, or in hand," and 800,000, "money loaned or advanced, or for goods sold; and all credits of any and every description." The contention was that "the situs of the loans and credits was in New York, the place of residence of the guardian and wards, and, therefore, being loans and credits without the State of Louisiana, they were not subject to taxation therein."

The question presented by the contention, this court said, was whether, under the statute as interpreted by the Supreme Court of the State, the properties were subject to taxation, and, if so subject, whether any rights secured by the Federal Constitution were thereby infringed. The tax was sustained, but it will be observed that negotiable paper was not assessed at all or dealt with as an entity separate from what it represented. The notes which represented the credits taxed were, it is true, in New Orleans, but in possession of the agent of Stempel. Not they, but the rights of which they were the evidence were taxed. The broad declaration, therefore, that negotiable paper had such tangibility as to be of itself a taxable entity was not called for. The true value of the case and its application to the case at bar can be estimated when we consider the other cases.

In *Bristol* v. *Washington County*, 177 U. S. 133, notes secured by mortgages in the State (Minnesota) were taxed. The question was of their situs. The state court put its decision on the ground that the notes were in the State for collection or renewal with a view of reloaning the money and keeping it invested as a permanent business. And this court in its decision said that "credits secured by mortgages, the result of the business of investing and reinvesting moneys in the State, were subject to taxation as having their situs there." The ruling was affirmed. We said, by Mr. Chief Justice Fuller: "Persons are not per-

mitted to avail themselves for their own benefit of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design" (p. 144).

In *Board of Assessors* v. *Comptoir National d'Escompte*, 191 U. S. 388, credits in the form of checks were taxed under the same statute considered in the *Stempel Case*. They were held in the State for investment and reinvestment, and this was the basis of the decision. The checks, it was said, became a credit for money loaned, localized in Louisiana, protected by it and within the scope of its taxing laws as construed by the Supreme Court. And we further said, after reviewing the *Stempel Case* and the *Bristol Case:* "From these cases it may be taken as the settled law of this court that there is no inhibition in the Federal Constitution against the right of the State to tax property in the shape of credits where the same are evidenced by notes or obligations held within the State, in the hands of an agent of the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a permanent business" (p. 403).

In *Metropolitan Life Insurance Co.* v. *New Orleans*, 205 U. S. 395, the assessment was also under the act passed on in the *Stempel Case*. I will not pause to detail the facts. It is enough to say that the credits taxed were loans (evidenced by notes) by the insurance company to its policy holders in Louisiana. The tax was not *eo nomine* on the notes but was expressed to be on "credits, money loaned, bills receivable," etc., and its amount was ascertained by computing the sum of the face value of all the notes held by the company at the time of the assessment.

The purpose of the taxing law was said to be to lay the burden of taxation equally upon those who do business within the State. And, after comment, it was said (p. 399): "Thus it is clear that the measure of the taxation

designed by the law is the fair average of the capital employed in the business." In other words, the investments in the State were taxed and the legality of the tax was determined by their situs, not by the locality of the notes which represented them, *the notes being in New York at the home of the insurance company.*

It was the situs of the debt which determined the legality of the taxation in all of the cases and united them under the principle expressed in *Metropolitan Life Insurance Co.* v. *New Orleans*, that the law regards the place of the origin of negotiable paper as its true home, to which it will return to be paid, and its temporary absence can be left out of account. They do not support the broad proposition that to negotiable paper can be ascribed such tangibility and entity as so to make it a taxable object of itself in a jurisdiction other than that of the obligation it represents. This broad generality is necessary to sustain the tax in the present case if it can be regarded a direct tax on property, for Illinois, not New York, is the situs of the debts of which the notes taxed are the evidence, and of the mortgages which secure them.

That broad proposition was asserted in *Buck* v. *Beach* and rejected. The notes involved had their origin in Ohio and represented investments in that State. Their owner died, and one of the two trustees of his will resided in Indiana. The notes were kept in the custody of the latter except that at the time of assessment of taxes in that State they were sent to Ohio and after the lapse of a few days returned to him. They were taxed in Indiana. The tax was sustained by the State Supreme Court but declared invalid by this court.

The proposition presented for decision was stated thus by Mr. Justice Peckham for the court: "The sole question then for this court is whether the mere presence of the notes in Indiana [the taxing State] constituted the debts of which the notes were the written evidence, property

within the jurisdiction of that State, so that such debts could be therein taxed" (p. 400). The prior cases were considered, and it was said: "There are no cases in this court where an assessment such as the one before us has been involved. *We have not had a case where neither the party assessed nor the debtor was a resident of or present in the State where the tax was imposed, and where no business was done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation.* We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the State" (p. 406). And it was pointed out that the prior cases, which were specifically reviewed, gave no support to the rejected doctrine. It was not overlooked that certain specialty debts, state and municipal bonds and circulating notes of banking institutions, have sometimes been treated as property where they were found though removed from the domicile of the owner, and *State Tax on Foreign-held Bonds*, 15 Wall. 300, 324, was cited. Promissory notes were held not to be within the rule.

It is, however, asserted that the circumstances of the case showed that the notes were fugitives from taxation, alternately from Indiana and Ohio, and that their stay in Indiana was in evasion of their obligations to Ohio and was "a transit, although prolonged." But the bad motive of the possessor of the notes was not made a ground of decision. If the court felt a retributive impulse to deny the notes sanctuary in Indiana it was suppressed. The court declared that the motive for sending the notes to Indiana was of no consequence and that the attempt to escape proper taxation in Ohio did not confer jurisdiction on Indiana to tax them (p. 402).

But we are not required to overrule *Buck* v. *Beach* nor make it yield in any particular in order to sustain the

tax in the case at bar. It, in effect, reserved from its principle inheritance or succession taxing acts by rejecting as not in point cases which involved them. We said, "The foundation upon which such acts rest is different from that which exists where the assessment is levied upon property. The succession or inheritance tax is not a tax on property, as has been frequently held by this court, *Knowlton* v. *Moore*, 178 U. S. 41, and *Blackstone* v. *Miller*, 188 U. S. 189, and therefore the decisions arising under such inheritance tax cases are not in point" (p. 408).

The tax under review is of that kind. In other words, it is not a tax on property, but a tax upon the transfer of the property by the will of the testator of plaintiffs in error as provided by the laws of the State. The will was probated in Connecticut, where the deceased was a resident, but ancillary letters of administration were issued to plaintiffs in error by the Surrogates' Court, County of New York, State of New York, and the taxed notes were part of the property disposed of by his will. It appears, therefore, that the property is in the control of the courts of New York. In other words, the laws of New York are invoked, accomplish its transfer and subject it to the dispositions of the will and make effectual the purposes of the testator. *Blackstone* v. *Miller, supra.*

I am dealing with the power of taxation under our decisions. If there be injustice in its exercise by measuring the tax by the value of the credits represented by the notes, it is an injustice which this court cannot redress.

I am authorized to say that MR. JUSTICE PITNEY concurs in this opinion.

MR. JUSTICE LAMAR, dissenting.

I concur in Mr. Justice McKenna's analysis of *Buck* v. *Beach* and the other cases, but am of the opinion that the principle there decided, applies as well to inheritance and

transfer taxes on notes as to direct taxes and that, therefore, the judgment in the present case should be reversed.

I am authorized to say that THE CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER concur in this dissent.